INDIAN CLAIMS COMMISSION PROCEEDINGS

(1999) 11 ICCP

Reports

Gamblers First Nation Treaty Land Entitlement Inquiry

Nekaneet First Nation Agricultural and
Other Benefits under Treaty 4 Inquiry

Moose Deer Point First Nation
Pottawatomi Rights Inquiry

Responses

Responses of the Minister of Indian Affairs and Northern Development
to the Gamblers First Nation Treaty Land Entitlement Inquiry
and to the
Muscowpetung First Nation, Pasqua First Nation,
Standing Buffalo First Nation, Sakimay First Nation,
Cowessess First Nation, and Ochapowace First Nation
re the Qu'Appelle Valley Indian Development Authority (QVIDA)
Flooding Claim Inquiry

INDIAN CLAIMS COMMISSION PROCEEDINGS

A PUBLICATION OF

THE INDIAN CLAIMS COMMISSION

(1999) 11 ICCP

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P.E. James Prentice, QC

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CONTENTS

Letter from the Co-Chairs
v

Abbreviations
vii

REPORTS

Gamblers First Nation Treaty Land Entitlement Inquiry
3

Nekaneet First Nation Agricultural and Other Benefits under Treaty 4 Inquiry
91

Moose Deer Point First Nation Pottawatomi Rights Inquiry
135

RESPONSES

Re: Gamblers First Nation Treaty Land Entitlement Inquiry
Jane Stewart, Minister of Indian Affairs and Northern Development,
to Daniel J. Bellegarde, Carole T. Corcoran, Roger Augustine,
Indian Claims Commission,
November 26, 1998
303

Re: Qu'Appelle Valley Indian Development Authority (QVIDA) Flooding Claim Inquiry
Jane Stewart, Minister of Indian Affairs and Northern Development,
to Chief Eugene Anaquod, Muscowpetung First Nation,
Chief Mathew Peigan, Pasqua First Nation,
Chief Melvin Isnana, Standing Buffalo First Nation,

Chief Lyle Acoose, Sakimay First Nation,
Chief Terrance Pelletier, Cowessess First Nation, and
Chief Denton George, Ochapowace First Nation,
December 3, 1998
304

THE COMMISSIONERS

311

FROM THE CO-CHAIRS

This is the eleventh volume of the *Indian Claims Commission Proceedings*. We are pleased to present it on behalf of the Commissioners of the Indian Claims Commission. The volume includes three reports of the Commission and seven letters from the Minister of Indian Affairs and Northern Development, responding to the Commission's recommendations in other completed inquiries.

The first report is on the Commission's inquiry into Gamblers First Nation Treaty Land Entitlement claim. The main issue was whether the First Nation's treaty land entitlement should be determined according to a population count from 1877, as Canada maintained, or from 1883, as the First Nation contended. The Commission conducted an inquiry and released a report setting out its findings and recommendation in October 1998.

The second report involves a claim accepted by Canada for negotiation under the Specific Claims Policy without the need for a full inquiry. The Nekaneet First Nation claims agricultural, hunting, and fishing benefits under Treaty 4. At issue was whether Canada had an existing and outstanding obligation to provide the First Nation with farm implements, tools, and livestock.

This report is an example of the effectiveness of the Commission's planning conferences. Simply by bringing representatives of the First Nation and Canada together to discuss the claim in an open, informal manner, disputes between the parties may be resolved.

The final report published in this volume involves a claim put forward by the Moose Deer Point First Nation. The First Nation claims that annual presents and promises of land, protection, and equality made in 1837 to their forefathers, the Pottawatomi, as aboriginal military allies were not delivered. As a result of the promises, at least 3000 Pottawatomi released their rights to land and annuities in the United States to move to Canada, where they were eventually left without land or economic support. The Commission released a report outlining its findings and recommendations in April 1999.

Also contained in this volume of the *Proceedings* are copies of seven letters from the Minister of Indian Affairs and Northern Development with respect to the claims of the Muscowpetung, Pasqua, Standing Buffalo, Sakimay, Cowessess, Ochapowace, and Gamblers First Nations under the

Specific Claims Policy. In the letters, the Minister writes that the Government of Canada accepts the Commission's recommendations regarding all these claims.

Daniel J. Bellegarde Co-Chair	P.E. James Prentice, QC Co-Chair

ABBREVIATIONS

BCCA	British Columbia Court of Appeal
BCR	Band Council Resolution
BCSC	British Columbia Supreme Court
CA	Court of Appeal
CCC	Canadian Criminal Cases
CLSR	Canada Land Survey Reports
CNLR	Canadian Native Law Reporter
CR	Criminal Reports
DIAND	Department of Indian Affairs and Northern Development
DLR	Dominion Law Reports
DLS	Dominion Land Surveyor
DSGIA	Deputy Superintendent General of Indian Affairs
FCTD	Federal Court Trial Division
ICC	Indian Claims Commission
ICCP	Indian Claims Commission Proceedings
IR	Indian Reserve
NA	National Archives of Canada
NR	National Reporter
NSCA	Nova Scotia Court of Appeal
NS Co. Ct	Nova Scotia County Court
ONC	Office of Native Claims
Ont. CA	Ontario Court of Appeal
OR	Ontario Reports
PAM	Provincial Archives of Manitoba
QB	Court of Queen's Bench
Que. CA	Quebec Court of Appeal

RCAP	Royal Commission on Aboriginal Peoples
RSC	Revised Statutes of Canada
Sask. R	Saskatchewan Reports
SC	Statutes of Canada
SCC	Supreme Court of Canada
SCR	Canada Supreme Court Reports
SCW	Specific Claims West
SGIA	Superintendent General of Indian Affairs
TARR	Treaty and Aboriginal Rights Research
TD	Trial Division
TLE	treaty land entitlement
WWR	Western Weekly Reports

REPORTS

Gamblers First Nation Treaty Land Entitlement Inquiry
3

Nekaneet First Nation Agricultural and Other Benefits under Treaty 4 Inquiry
91

Moose Deer Point First Nation Pottawatomi Rights Inquiry
135

INDIAN CLAIMS COMMISSION

GAMBLERS FIRST NATION INQUIRY
TREATY LAND ENTITLEMENT CLAIM

PANEL

Commission Co-Chair Daniel J. Bellegarde
Commissioner Roger J. Augustine
Commissioner Carole T. Corcoran

COUNSEL

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For the Government of Canada
François Daigle

To the Indian Claims Commission
Ron S. Maurice / Thomas A. Gould

OCTOBER 1998

CONTENTS

PART I ***INTRODUCTION*** 7
Background 7
  Map of Gamblers Indian Reserve 63 8
Mandate of the Indian Claims Commission 10
The Inquiry 11
Interests of the Waywayseecappo First Nation in this Inquiry 13

PART II ***HISTORICAL BACKGROUND*** 16
Treaty 4 – Qu'Appelle Lakes 16
Treaty 4 – Fort Ellice Adhesion 18
Selection and Survey of Bird Tail Creek Indian Reserve in 1877 20
Indians paid under Chief Waywayseecappo at Fort Ellice 28
  Sakimay 29
  South Quill 30
  Rattlesnake 31
  The Gambler 32
Gambler's Discontent with Location of Bird Tail Creek Reserve 33
Surrender for Exchange in 1881 36
Survey of Lizard Point and Silver Creek Reserves 39
  Map of Waywayseecappo's Band Reserve No. 62 – Lizard Point 42
The Gambler's Discontent with the Silver Creek Reserve 43

PART III ***ISSUES*** 49

PART IV ***ANALYSIS*** 51
Issue 1: Date of First Survey 51
  Principles of Treaty Interpretation 52
  "Conference with Each Band of the Indians" 58
    The Meaning of Conference 59
    Was There Consensus? 69
    Authority of Laird and Wagner to Select Reserves 76
    Waywayseecappo's Authority to Select Reserves 79
Issue 2: Impact of the 1881 Surrender for Exchange 84

PART V *RECOMMENDATION* 88

APPENDIX 89
A Gamblers First Nation Treaty Land Entitlement Inquiry 89

PART I

INTRODUCTION

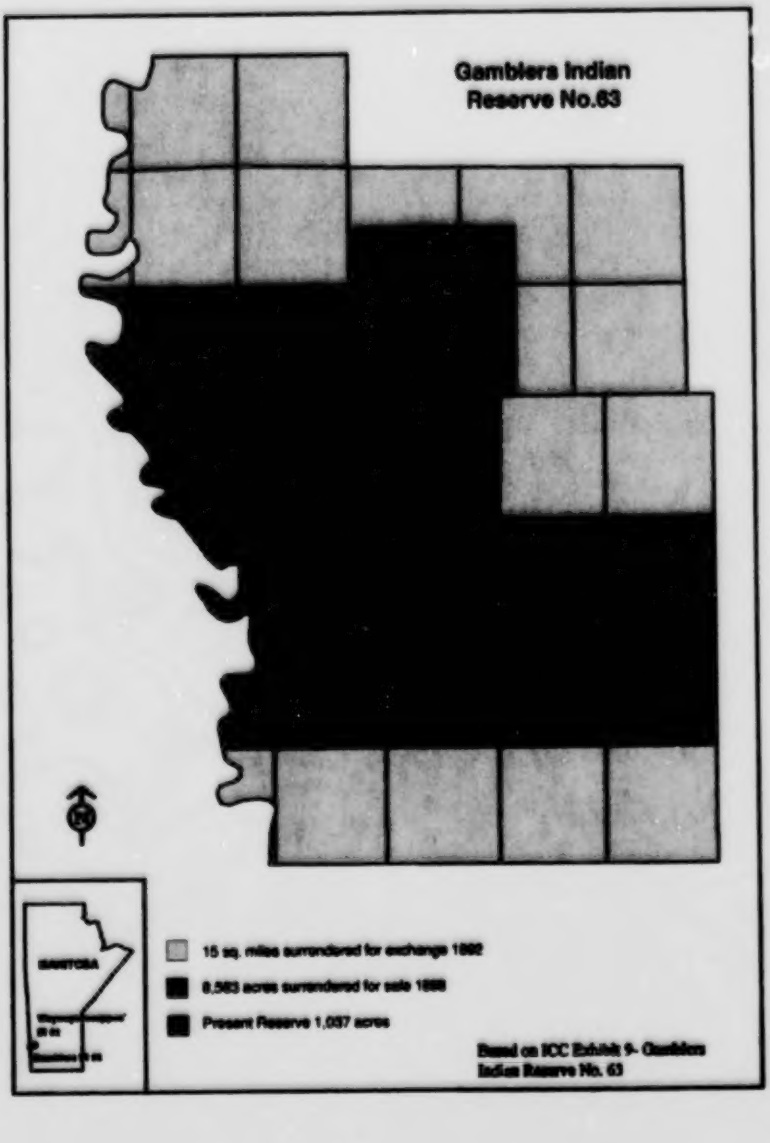
BACKGROUND

This inquiry arises out of a claim by the Gamblers First Nation that Canada continues to owe it reserve land under the terms of Treaty 4.[1] The Gamblers First Nation adhered to Treaty 4 on September 21, 1874, as part of a group of Saulteaux Indians referred to as the "Fort Ellice Band" by Indian Commissioners Alexander Morris, David Laird, and W.J. Christie. During the treaty negotiations, the Gambler was a powerful spokesperson for this Band. The treaty indicates that the Band was led by Chief Waywayseecappo, but it included groups that were eventually recognized by Canada as separate bands under the Gambler, South Quill, Rattlesnake, and Sakimay. Under the terms of the treaty, Canada agreed to set aside reserves of one square mile (640 acres) for each family of five, or 128 acres per person. However, the treaty does not specify the time at which a band's population is to be calculated for the purposes of determining how much reserve land should be set aside for its collective use; nor does the treaty specify what the respective rights and obligations of the parties are in a situation in which a group within the band seeks and obtains a surrender of a portion of the reserve land so that a separate reserve can be set apart at another location. It is this latter feature that is unique to the Gamblers First Nation treaty land entitlement claim.

According to the First Nation, the Gambler and his followers did not have a reserve set apart for their own use and benefit until 1883 when, following

---

[1] For background on the difficult subject of treaty land entitlement, see the inquiry reports previously released by the Indian Claims Commission (ICC) relating to the Fort McKay First Nation, Kawacatoose First Nation, Lac La Ronge Indian Band, Kahkewistahaw First Nation, and Lucky Man Cree Nation: ICC, *Fort McKay First Nation Report on Treaty Land Entitlement Inquiry* (Ottawa, December 1995), reported (1996) 5 *Indian Claims Commission Proceedings* (ICCP) 3; ICC, *Kawacatoose First Nation Report on Treaty Land Entitlement Inquiry* (Ottawa, March 1996), reported (1996) 5 ICCP 73; ICC, *Lac La Ronge Indian Band Report on Treaty Land Entitlement Inquiry* (Ottawa, March 1996), reported (1996) 5 ICCP 235; ICC, *Kahkewistahaw First Nation Report on Treaty Land Entitlement Inquiry* (Ottawa, November 1996), reported (1998) 6 ICCP 21; and ICC, *Lucky Man Cree Nation Report on Treaty Land Entitlement Inquiry* (Ottawa, March 1997), reported (1998) 6 ICCP 109.


Gamblers Indian
Reserve No.63
MANITOBA
▨ 15 sq. miles surrendered for exchange 1882
■ 8,583 acres surrendered for sale 1898
■ Present Reserve 1,037 acres

Based on ICC Exhibit 9- Gamblers Indian Reserve No. 63

the "surrender for exchange" in 1881 of a portion of the reserve originally surveyed for the Fort Ellice Band at Bird Tail Creek in 1877, a new reserve for the Gambler was laid out by Dominion Land Surveyor A.W. Ponton at Silver Creek. The First Nation submits that the 1877 survey was not conducted in accordance with the terms of Treaty 4 and must be considered invalid. Therefore, the First Nation claims that the appropriate date to be used to determine its entitlement to land is 1883, the year that reserve land was first surveyed for Gamblers First Nation. The First Nation asserts that its population in 1883 was 215, including individuals later paid arrears for that year, resulting in a treaty land entitlement of 27,520 acres. Since Indian Reserve (IR) 63, surveyed by Ponton, consisted of only 19,200 acres, the Gamblers First Nation claims a shortfall of 8320 acres.

By way of contrast, the Government of Canada argues that the Gambler was a member of Waywayseecappo's band in 1877 and that he and his people must be considered to have received their land entitlement as part of the survey of reserve land for the Fort Ellice Band in that year. At that time, surveyor William Wagner laid out a reserve of 71.67 square miles (45,869.49 acres), which was sufficient land for 358 people. Canada submits that, if the Sakimay and South Quill groups, which received separate reserves in 1876 and 1882, respectively, are excluded from consideration, the population of Waywayseecappo's band in 1877 was 190; therefore, the reserve set apart by Wagner satisfied the band's treaty land entitlement. Alternatively, if the Sakimay and South Quill groups are included, Canada contends that the 16,691 acres in their two reserves must also be included and the Fort Ellice Band's treaty land entitlement was still met. Finally, even if the First Nation is correct in its submission that 1883 was the date of first survey, Canada argues that the population figure of 215 relied on by the First Nation must be "revised downward to 148 by taking into account 26 "double counts,' 14 'one-time onlies' and 27 other 'probable double counts.'"[2] Since the 1883 survey provided 30 square miles of land – sufficient for 150 people – Canada claims that the First Nation received a surplus of reserve land even if you accept that the First Nation's assertion that the appropriate date to determine its land entitlement is 1883.

The central question in this inquiry is whether the Gamblers First Nation's treaty land entitlement should be determined according to the population of the Fort Ellice Band under Chief Waywayseecappo in 1877, when the Bird

---

[2] Supplementary Submissions on Behalf of the Government of Canada, May 9, 1997, p. 9.

Tail Creek reserve was first surveyed, or in 1883, when the survey was completed for the Gambler's reserve at Silver Creek. It should be borne in mind, however, that the Commission has been asked to determine only what the appropriate date is for the purposes of calculating the treaty land entitlement of Gamblers First Nation. We have not been asked to determine the quantum of land the First Nation is entitled to or whether an outstanding entitlement to land is still owed by the Crown today.

MANDATE OF THE INDIAN CLAIMS COMMISSION

The Commission's mandate to conduct inquiries pursuant to the *Inquiries Act* is set out in a commission issued on September 1, 1992. The Order in Council directs:

> that our Commissioners on the basis of Canada's Specific Claims Policy . . . by considering only those matters at issue when the dispute was initially submitted to the Commission, inquire into and report upon:
>
> (a) whether a claimant has a valid claim for negotiation under the Policy where that claim has already been rejected by the Minister; and
>
> (b) which compensation criteria apply in negotiation of a settlement, where a claimant disagrees with the Minister's determination of the applicable criteria.[3]

The Specific Claims Policy is set forth in a 1982 booklet published by the Department of Indian Affairs and Northern Development (DIAND) entitled *Outstanding Business: A Native Claims Policy – Specific Claims*.[4] In considering a specific claim submitted by a First Nation to Canada, the Commission must assess whether Canada owes an outstanding lawful obligation to the First Nation in accordance with the guidelines provided in *Outstanding Business*:

> The government's policy on specific claims is that it will recognize claims by Indian Bands which disclose an outstanding "lawful obligation," i.e., an obligation derived from the law on the part of the federal government.
>
> A lawful obligation may arise in any of the following circumstances:
>
> i) The non-fulfillment of a treaty or agreement between Indians and the Crown.

---

[3] Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730, July 27, 1992, amending the Commission issued to Chief Commissioner Harry S. LaForme on August 12, 1991, pursuant to Order in Council PC 1991-1329, July 15, 1991 (Consolidated Terms of Reference).

[4] Department of Indian Affairs and Northern Development (DIAND), *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), reprinted in [1994] 1 ICCP 171-85.

> ii) A breach of an obligation arising out of the *Indian Act* or other statutes pertaining to Indians and the regulations thereunder.
>
> iii) A breach of an obligation arising out of government administration of Indian funds or other assets.
>
> iv) An illegal disposition of Indian land.
>
> . . .
>
> In addition to the foregoing, the government is prepared to acknowledge claims which are based on the following circumstances:
>
> i) Failure to provide compensation for reserve lands taken or damaged by the federal government or its agencies under authority.
>
> ii) Fraud in connection with the acquisition or disposition of Indian reserve land by employees or agents of the federal government, in cases where the fraud can be clearly demonstrated.[5]

THE INQUIRY

The First Nation's claim to an outstanding treaty land entitlement was first submitted to Canada in 1981 and was most recently considered and rejected by the Department of Indian Affairs and Northern Development on March 17, 1994. A.J. Gross, Indian Affairs' Director of Treaty Land Entitlement, informed Chief James Tanner that the claim had been rejected on the following grounds:

> Upon review of the research it remains our view that Canada's treaty land obligation to the group which eventually became the Gamblers' [sic] Band was satisfied when land was surveyed in 1877 for that group as part of the Waywayseecappo Band. Since the Gamblers Band did not exist in 1877 when the obligation was fulfilled, it is to the Waywayseecappo Band that one must look to determine whether Canada has fulfilled its lawful obligation. There is no evidence that members of the Gamblers Band, created sometime after the March 7, 1881 surrender vote, considered themselves a separate band prior to 1881.
>
> It is, rather, our view, that the 1881 surrender resulted in agreement by Waywayseecappo Band members that its Bird Tail Creek Reserve could be reduced by 30 square miles in order to allow members who wanted to form the Gamblers Band to take a reserve of equal size elsewhere. This band division does not alter the fact that Canada had already set aside enough land to satisfy its treaty land entitlement obligation to those band members.[6]

---

[5] DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), 20, reprinted in [1994] 1 ICCP 171-85.

[6] A.J. Gross, Director, Treaty Land Entitlement, Dept. of Indian Affairs, Vancouver, BC, to Chief & Council, Gamblers Indian Band, Binscarth, Manitoba, March 17, 1994 (ICC Documents, pp. 703-04).

On January 22, 1996, Chief Tanner wrote to the Indian Claims Commission (the Commission) to request that this inquiry be convened,[7] and by June 14 of that year a planning conference had been held to discuss and to refine the issues, to clarify the parties' positions, and to plan the course of the inquiry. At the planning conference, the parties agreed that the Commission would be asked for its recommendations with regard to three issues:

1 Was Canada's obligation to provide treaty lands to the claimant in respect of the adherence to Treaty No. 4 on September 21, 1874 satisfied in 1877 with the selection and survey of the lands at Birdtail [sic] Creek for the "Fort Ellice Band"?

2 To what extent, if at all, did the "surrender for exchange" in 1881 affect the treaty land entitlement of the claimant?

3 What is the quantum of the claimant's outstanding treaty land entitlement, if any?[8]

The parties also discussed whether the Gamblers' treaty land entitlement claim might affect other bands. Counsel for the First Nation, however, advised that "Rolling River's T.L.E. [treaty land entitlement] is not affected as their T.L.E. has been accepted [for negotiation by Canada]," and added that, "while other First Nations may be asked to provide information on their understanding of the historical background to the claim, no other First Nation has a legal interest in this claim and nor would they be affected by the Commission's recommendations."[9]

Following the receipt of written legal submissions by the First Nation on October 24, 1996, and by Canada on October 29, 1996, the Commission convened a hearing in Binscarth, Manitoba, on November 5 and 6, 1996, to receive testimony from members of the Gamblers First Nation and to hear legal arguments. However, because Canada had been unable to complete its paylist research and analysis, it was agreed that the oral submissions by counsel would be limited to two issues dealing with the appropriate date of first survey and the effect of the 1881 "surrender for exchange."

---

[7] Chief James Tanner, Gamblers First Nation, Binscarth, Manitoba, to Indian Claims Commission, Ottawa, January 22, 1996.

[8] Indian Claims Commission, Planning Conference Summary: Gamblers First Nation Treaty Land Entitlement, Ottawa, Ontario, June 14, 1996, p. 14.

[9] Indian Claims Commission, Planning Conference Summary: Gamblers First Nation Treaty Land Entitlement, Ottawa, Ontario, June 14, 1996, pp. 11-12. The Rolling River First Nation comprises the descendants of South Quill and his people.

Canada later filed supplementary written submissions on May 9, 1997, to address the issue of the quantum, if any, of the First Nation's outstanding treaty land entitlement. The First Nation intended to respond to those submissions but, by that time, the research capacity of the Treaty and Aboriginal Rights Research (TARR) Centre of Manitoba, Inc., had been dedicated to assist in finalizing the Manitoba Treaty Land Entitlement Framework Agreement. For this reason, the parties agreed that the Commission's findings and recommendations in this inquiry should be restricted to identifying the Gamblers' date of first survey and determining the impact of the 1881 "surrender for exchange" on the First Nation's treaty land entitlement pending further confirming research to be conducted by the First Nation.

During the course of the inquiry, the Commission has considered, in addition to the written and oral submissions already mentioned, some 700 pages of historical documents in addition to 11 other exhibits comprising several thousand pages of material. A summary of the written submissions, documentary evidence, transcripts, and the balance of the record in this inquiry is set forth in Appendix A of this report.

INTERESTS OF THE WAYWAYSEECAPPO FIRST NATION IN THIS INQUIRY

Shortly after the completion of the oral sessions in November 1996, the Commission received a letter from Chief Murray Clearsky and the Waywayseecappo First Nation Band Council expressing concern that Waywayseecappo had not been notified of the inquiry or given an opportunity to participate, although it appeared that the issues being addressed might directly affect that First Nation. The Council added that it also had claims with the federal government arising from the same circumstances.[10]

In a subsequent letter, the Waywayseecappo First Nation provided a fuller outline of its position:

> Our position is that the surrender of 1881 which purportedly surrendered 30 sections of land was invalid under the provisions of the *Indian Act* in force at the time.
>
> This surrender is invalid because only 23 out of at least 7 [sic] male members of the Band of the full age of 21 years assented to the surrender. A majority of the Band must assent.

---

[10] Chief and Council, Waywayseecappo First Nation, to Ron S. Maurice, Indian Claims Commission, Ottawa, November 14, 1996 (ICC file 2106-09-1).

> Alternatively if the surrender is valid which we deny, under the terms of the surrender it says, "And whereas since the assignment thereof as foresaid it has been found more convenient and for the interests of the said Band of Indians that the boundaries of the said reserve on the south and east side should be altered and in lieu of the lands (herein after described) by such alterations of boundaries ex[c]luded other lands of equal extent assigned to the said band." The surrender itself says that the band be assigned other land of equal extent. The band being what is now Waywayseecappo First Nation.
>
> Presumably this is why the department considered the band as one until the early 1970's when the government changed how it treated the people at Gamblers. The surrender dealt with 30 sections of land, Waywayseecappo First Nation was left 39 sections at its present location and three disappeared in the shuffle. The majority of the 30 sections that Waywayseecappo First Nation was assigned at what is now Gamblers was then surrendered without further notice to Waywayseecappo First Nation. These further surrenders directly affect the land base of Waywayseecappo First Nation because they dispose of land that belonged to the people of Waywayseecappo First Nation.[11]

Eventually, following a meeting involving Commission counsel, Chief Clearsky, and other members of the Band Council, it was agreed by Waywayseecappo that the Commission could proceed without evidence or submissions from that First Nation subject to the following understandings set forth in a letter dated January 27, 1998, from Ron S. Maurice, Commission Counsel, to the Chief and Council:

> the issues raised in [the Gamblers First Nation] inquiry, the historical evidence provided, and the legal arguments made in support of this claim relate to the specific claim of the Gambler's First Nation only. The Commission's mandate is to inquire into the claim and make recommendations to the Minister of Indian Affairs and Northern Development on whether the specific claim was properly rejected by Canada. The Commission will not make any decisions regarding the validity of any other potential claim by a First Nation unless we have been requested to do so. Nonetheless, I understand that there may be common historical facts and evidence between the Gambler's First Nation claim and any potential claim by the Waywayseecappo First Nation.
>
> Generally speaking, the issues before the Commission relate to Canada's obligation to provide treaty land to the First Nations who adhered to Treaty 4 on September 21, 1874 and whether that obligation was met with the selection and survey of lands in 1877 at Birdtail [sic] Creek for the Fort Ellice Band. There are only two specific issues before the Commission: (1) what is the appropriate date of first survey? Is it 1877 when lands were set aside at Birdtail [sic] Creek or is it 1883 when Gambler's Indian Reserve #83 was set aside? (2) what impact, if any, did the "surrender for

---

[11] Chief Murray Clearsky and Council, Waywayseecappo First Nation, to Ron S. Maurice, Commission Counsel, Indian Claims Commission, March 12, 1997 (ICC file 2106-09-1).

> exchange" in 1881 have on the treaty land entitlement of the claimants? Regardless of whether the Commission recommends that the proper date of first survey is 1877 or 1881, it has been agreed that the Commission will not be making any recommendations on whether the Gambler's First Nation has an outstanding TLE shortfall and, if so, how much land is still owed because the parties have not completed the necessary paylist research and analysis.
>
> For the sake of clarification, it might be helpful to summarize the issues that are not before the Commission in this inquiry. First, it should be emphasized that neither Canada [n]or the Gambler's First Nation has challenged the validity of the 1881 "surrender for exchange" so the Commission will not be making any findings on whether it was in compliance with the Crown's statutory or fiduciary obligations. Although it will be assumed to be valid for the purposes of addressing the issues in this inquiry, this is without prejudice to the Waywayseecappo First Nation and it would not preclude you from submitting a claim alleging that the 1881 surrender was invalid. Second, the Commission will not be making any findings on whether an outstanding TLE shortfall exists and, if so, who would be entitled to the shortfall acreage. Third, we are not considering whether there is a valid claim in relation to the approximately 3 square miles that were not accounted for after the "surrender for exchange" was completed and, if so, who is entitled to seek compensation for such a claim. Finally, we are not considering whether any subsequent band splits or surrenders of reserve land have any bearing on the potential claims of the First Nations. Therefore, this would not preclude the Waywayseecappo First Nation from submitting a claim in relation to any of the above issues.
>
> In view of the above, the Commission would be prepared to explicitly state in its final report that the findings and recommendations made by the Commission are expressly limited to the specific claim of the Gambler's First Nation and are without prejudice to any claim or claims that the Waywayseecappo First Nation has or may have regarding the land set aside at Birdtail [sic] Creek for the adherents to Treaty 4. Furthermore, the findings and recommendations of the Commission will be subject to the understanding that we have not received submissions from the Waywayseecappo First Nation. When the Commission has issued its report, a copy of it will be provided to you for your consideration and if you have any concerns regarding the findings and recommendations of the Commission, it would be open for the Waywayseecappo First Nation to submit its own claim and submissions in relation to any of the historical or legal issues addressed in that report.[12]

The Commissioners hereby acknowledge and incorporate the foregoing understanding as part of this report.

We now turn to the factual background to the claim.

---

[12] Ron S. Maurice, Commission Counsel, Indian Claims Commission, to Chief Murray Clearsky and Council, Waywayseecappo First Nation, January 27, 1998.

PART II

HISTORICAL BACKGROUND

The historical evidence related to the Gamblers First Nation's claim, reviewed in this Part, includes several volumes of documentary evidence and the testimony provided by members of the Gamblers First Nation at a community session on November 5, 1996. The Commission also considered the written submissions of the First Nation and Canada in addition to hearing oral submissions from legal counsel for the parties on November 6, 1996.

TREATY 4 – QU'APPELLE LAKES

In the summer of 1874, Alexander Morris, David Laird, and W.J. Christie[13] were appointed Commissioners to negotiate Treaty 4 with the Cree and Saulteaux Indians inhabiting an area of roughly 75,000 square miles lying west of the territory covered by Treaty 2 and situated between the United States/Canada boundary to the south and the Saskatchewan River to the north.[14] Fort Qu'Appelle was selected as a "convenient centre" for the negotiations,[15] and the Commissioners arrived there on September 8, 1874. Already gathered were Crees from various localities within the Treaty 4 area, as well as Saulteaux from Fort Pelly, Cypress Hills, Fort Ellice, and Qu'Appelle Lakes.

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[13] At the time of the treaty negotiations, Alexander Morris was the Lieutenant Governor of the North-West Territories, David Laird was the federal Minister of the Interior in the Liberal government of Alexander Mackenzie, and W.J. Christie of Brockville, Ontario, was a retired Hudson's Bay Company factor "and a gentleman of large experience among the Indian tribes." Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (Toronto: Belfords, Clarke & Co., 1880; reprinted Saskatoon: Fifth House Publishers, 1991) [hereafter Morris, *Treaties of Canada*], 78.

[14] Order in Council PC 944, July 23, 1874, provides the general description for the area to be ceded; Order in Council PC 1332, November 4, 1876, refers to the appointment of the Commissioners. Both are found in *Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice* (Ottawa: Queen's Printer, 1966), 3.

[15] Morris, *Treaties of Canada* ,78.

Upon his arrival in Qu'Appelle, Morris called upon the assembled Indians to identify the people who could speak for them.[16] According to this account of Morris's opening remarks, he said:

> "[To the Crees] . . . We want to speak to you about the land and what the Queen is willing to do for you, but before we tell you, we want you to tell us, who your Chiefs and headmen are who will speak for you, while we speak for the Queen, and we want to know what bands of Crees are here and who will speak for them. . . ."
>
> To the Saulteaux His Honor said: ". . . If you and your Chiefs will meet together in council and talk it over we will be glad to meet you, if you bring your Chief [Cote] to-morrow. You must also choose your speakers who will come with your Chief and speak for you."[17]

On September 9, 1874, Morris repeated his request that the assembly name its speakers. Can-a-ha-cha-pew, the Man of the Bow, replied that they were not ready, but "Peicheto's son, O-ta-ha-o-man, the Gambler" arose and addressed the crowd: "My dear friends, do you want me to speak for you to these great men?" and "the Indians signified their consent."[18] On the fourth day of the proceedings, both Cote, referred to by Commission Secretary M.G. Dickieson as "a leading Chief of the Saulteaux tribe" from Fort Pelly,[19] and Loud Voice, considered by Morris to be the "principal Chief" of the Crees,[20] indicated that the Gambler would speak on their behalf.[21]

Throughout the fourth and fifth days of the conference, the Gambler was virtually the only Indian speaker, but he insisted that they could not consider the terms of a treaty until the Indians' complaints about the Hudson's Bay Company were dealt with. Morris countered that he could not deal with Company matters, and was only there to discuss a treaty. It was not until the sixth and final day of the negotiations that the terms of a treaty agreement were discussed, and on that day the Gambler was silent.[22]

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[16] This formality of asking the Indians to name their Chiefs started with the negotiation of Treaty 1 in 1871, at which Lieutenant Governor Archibald sought to avoid some of the problems that had arisen out of the Selkirk Treaty:

> At the time of the treaty with the Earl of Selkirk, certain Indians signed as Chiefs and representatives of their people. Some of the Indians now deny that these men ever were Chiefs or had authority to sign the treaty.
>
> With a view therefore to avoid a recurrence of any such question, we asked the Indians, as a first step, to agree among themselves in selecting their Chiefs, and then to present them to us and have their names recorded.

Adams G. Archibald, Lieutenant Governor of Manitoba, to Joseph Howe, Secretary of State, July 29, 1871, in Morris, *Treaties of Canada*, 33.

[17] Morris, *Treaties of Canada*, 88-89.

[18] Morris, *Treaties of Canada*, 90.

[19] Morris, *Treaties of Canada*, 87.

[20] Alexander Morris, Lieutenant Governor, NWT, to Secretary of State for the Provinces, October 17, 1874, in Morris, *Treaties of Canada*, 80.

[21] Morris, *Treaties of Canada*, 97 and 110.

In later years, Morris would refer to the Gambler as "the chief spokesman" at Qu'Appelle,[23] but it appears that he did not participate at the conference as a chief. At one point during the negotiations, the Gambler pointed to someone else and said, "This is my chief."[24] Yet, the following day, he told Morris that "we have not chosen our Chiefs; we have not appointed our soldiers and councillors."[25] Once agreement on terms was reached, the Gambler was not brought forward as a Chief and did not sign the Treaty 4 document.

TREATY 4 – FORT ELLICE ADHESION

In the fall of 1873, a group of Indians at Fort Ellice, maintaining that they had not been party to any treaty, had complained to Lieutenant Governor Morris about survey work in progress on their lands. The petition, signed by "Wah-wa-shi-cabow" (Waywayseecappo) and three others, defined the land which they claimed to occupy:

> We the undersigned Saulteaux Indians at Fort Ellice, having seen a surveyor here marking out & posting off land, wish to inform Your Honour that we have never been a party to any Treaty already made to extinguish our title to land which we claim as ours, from Shoal Lake, on Oak River, westward to ten miles west of Fort Ellice, and therefore, cannot understand why this land should be surveyed.
> We are &c
> Wah-wa-shi-cabow x
> Kisak-ka-zick x
> Kannskagunin x
> Shapuy-witunk x[26]

Most of the land identified in the petition was included in the territory ceded under Treaty 2 in August 1871. In that treaty, five chiefs – including "Mekis

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[22] Morris, *Treaties of Canada*, 87-125.

[23] Alexander Morris to Minister of the Interior, July 8, 1876, and December 4, 1876, in Morris, *Treaties of Canada*, 142 and 187.

[24] Morris, *Treaties of Canada*, 104. The Gambler was probably referring to Cote as "Chief" in this instance. Cote was the only Saulteaux Chief identified at the negotiations, and it is known that the Gambler traded around Fort Pelly where Cote resided.

[25] Morris, *Treaties of Canada*, 114.

[26] Petition, October 11, 1873 (ICC Exhibit 2, p. 1). This document is transcribed at pp. 1-2 of Treaty & Aboriginal Rights Research Program, Four Nations Confederacy, "Waywayseecappo I.R. No. 62, Gambler's I.R. No. 63 and Rolling River I.R. No. 67 Treaty Land Entitlement Report," May 1981 (ICC Exhibit 2). Any words not legible on the copy of the original are taken from the transcription.

[Michis] (the Eagle), or Giroux," who was identified as the Chief of "the Indians of Riding Mountain and Dauphin Lake and the remainder of the territory hereby ceded"[27] – claimed to represent the Indians in the area. However, the Fort Ellice Indians denied that they had given Mekis authority to speak for them and therefore did not consider themselves to be bound by the terms of Treaty 2. The Hudson's Bay Company trader in charge of the Swan River District seemed to agree:

> I have merely to report that the Fort Ellice Indians have not made any treaty for their lands. The treaty made by Michis and his band (belonging to Riding Mountain) they do not recognize as binding on the Fort Ellice Indians as Michis had not authority to act in their names.[28]

Morris concluded that "[t]hese Indians were included in the boundaries of Treaty Number Two, but had not been treated with owing to their distance from Manitoba House, where that treaty was made."[29]

Given these circumstances, it would have been usual to have the Fort Ellice Saulteaux adhere to the treaty covering their traditional hunting grounds. However, the North West Angle Indians who signed Treaty 3 in October 1873 received substantially more reserve land and annuities than had been negotiated in the previous treaties, and Morris may have felt that it would be impossible to convince the Fort Ellice Indians to accept the less favourable terms of Treaty 2. Instead, he invited them to go to Qu'Appelle in September 1874 to participate in the negotiation of Treaty 4. When they declined, Morris agreed to meet with them at Fort Ellice on his return.[30]

Commissioners Laird and Morris arrived at Fort Ellice on Saturday, September 19, 1874, and met with the assembled Indians on Monday, September 21. Not all the Indians of the Fort Ellice area were present, but those in attendance agreed to accept the terms of the Qu'Appelle treaty:

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[27] *Treaties 1 and 2 between Her Majesty the Queen and the Chippewa and Cree Indians of Manitoba and Country Adjacent with Adhesions* (Ottawa: Queen's Printer, 1957), 11.

[28] Archibald McDonald, Trader in charge of Swan River District, Hudson's Bay Company, to Alexander Morris, Lieutenant Governor of North-West Territories, June 6, 1874, National Archives of Canada (hereafter NA), RG 10, vol. 3610, file 3539 (ICC Documents, p. 3).

[29] Morris, *Treaties of Canada*, 79; Alexander Morris, Lieutenant Governor, NWT, to Secretary of State for the Provinces, October 17, 1874, in Morris, *Treaties of Canada*, 84-85.

[30] Alexander Morris, Lieutenant Governor, NWT, to Secretary of State for the Provinces, October 17, 1874, in Morris, *Treaties of Canada*, 84 (see also 98).

> On Monday we met the Band of Saulteaux Indians, who make their headquarters at Fort Ellice, and who have remained there, instead of going to Qu'Appelle at our request.
>
> This Band have been in the habit of migrating between the region covered by the Second Treaty and that comprehended by the Fourth, but had not been treated with.
>
> We proposed to them to give their adhesion to the Qu'Appelle Treaty, and surrender their claim to lands, wherever situated, in the North-West Territories, on being given a reserve and being granted the terms on which the treaty in question was made. We explained fully these terms and asked the Indians to present to us their Chief and headmen. As some of the band were absent, whom the Indians desired to be recognized as headmen, only the Chief and one headman were presented. These, on behalf of the Indians accepted the terms and thanked the Queen and the Commissioners for their care of the Indian people.[31]

On the adhesion document, Waywayseecappo and headman Ota-ma-koo-ewin (also known as "Sha-pous-e-tung's-First Son" or "The Man Who Stands on the Earth") affixed their marks on behalf of the assembled Saulteaux. Long Claws was the only other Indian mentioned by name at the Fort Ellice meeting in 1874.[32]

SELECTION AND SURVEY OF BIRD TAIL CREEK INDIAN RESERVE IN 1877

Reserve sites were not defined at the negotiations in 1874, but Treaty 4 specified that the bands would be consulted about location when reserves were surveyed:

> And Her Majesty the Queen hereby agrees, through the said Commissioners, to assign reserves for said Indians, such reserves to be selected by officers of Her Majesty's Government of the Dominion of Canada appointed for that purpose, *after conference*

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[31] Alexander Morris, Lieutenant Governor, NWT, to Secretary of State for the Provinces, October 17, 1874, in Morris, *Treaties of Canada*, 84.

[32] *Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice* (Ottawa: Queen's Printer, 1966), 9. The notes taken by M.G. Dickieson, the Commission Secretary, state that a Chief and *two* headmen were presented, but the two names he recorded – "Ota-ma-koo-euin" and "Shaponetung's first son" – were the two which the adhesion document later attributed to the same man: Alexander Morris, Lieutenant Governor, NWT, to Secretary of State for the Provinces, October 17, 1874, in Morris, *Treaties of Canada*, 125. According to the paylists, two headmen were paid with Waywayseecappo in 1874. However, while the 1874 paylists provided names for the Chiefs, none of the other members of the bands were named but instead were merely categorized as "Headman" or "Indian." Nevertheless, from the 1875 paylists, it can be determined that the two men paid as headmen in 1874 were #22 Ota-Ma-Koo-ewin and #23 Savage. For Long Claws, see Morris, *Treaties of Canada*, 124.

> *with each band of the Indians*, and to be of sufficient area to allow one square mile for each family of five, or in that proportion for larger or smaller families.[33]

In an Order in Council dated July 9, 1875, W.J. Christie was appointed, together with "such other person as may be named for that purpose by the Minister of the Interior," to return to Fort Ellice and Qu'Appelle to obtain adhesions to Treaty 4 from bands absent the previous year, to pay annuities, and to meet with the bands to select reserves

> where they shall be deemed most convenient and advantageous for the Indians, each Reserve to be selected as provided by the Treaty *after conference with the Band of Indians interested therein*, and subject to the other conditions set forth in the Treaty.[34]

With regard to the last of these duties, Deputy Minister of the Interior E.A. Meredith provided the following additional instructions to Christie:

> I. As regards the selection of the Reserves.
>
> Each Reserve should be selected, as the Treaty requires, after conference with the Band of Indians interested, and should, of course, be of the area provided by the Treaty.
>
> The Minister thinks that the Reserves should not be too numerous, and that, so far as may be practicable, as many of the Chiefs of Bands speaking one language, as will consent, should be grouped together on one Reserve.
>
> In connection with this part of your duties, I am desired to enclose for your information a copy of a memorandum and map prepared by the Surveyor General.
>
> The Minister desires me to inform you that he coincides with the views of the Surveyor General contained in that memo; I am to add that Mr. Wagner, the gentleman named in the memorandum will be instructed to place himself at your disposal for the purpose of proceeding, with the Surveys of the Reserves as selected in the manner recommended by the Surveyor General.[35]

Christie was given additional suggestions regarding the selection of reserves by the Surveyor General, J.S. Dennis, who recommended that the surveys take place "as soon as possible after the location of the Reserves in question may be decided upon between the Commissioner and the Indians," but that in locating the reserves the Commissioner should consider future settlement, the proposed route of the railway and both the agricultural and hunting needs of the Indians.[36] Christie confirmed his instructions in a letter dated July 28, 1875, to Meredith:

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[33] *Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice* (Ottawa: Queen's Printer, 1966), 6. Emphasis added.

[34] Order in Council, July 9, 1875, NA, RG 10, vol. 3622, file 5007 (ICC Documents, p. 46). Emphasis added.

[35] E.A. Meredith, Deputy Minister, Department of the Interior, to W.J. Christie, Treaty Commissioner, July 15, 1875, NA, RG 10, vol. 3622, file 5004 (ICC Documents, pp. 57-58).

> 1. Selection of Reserves for Indians
>
> These will be as few in number as possible, and in locating them, every attention will be paid to the suggestions made by the Minister of Interior, as also in the memorandum furnished by the Surveyor General. As soon as the first Reserve has been decided on, probably with the Fort Ellice Indians, Mr. Wagner will be instructed to proceed with the Survey in the manner directed by the Surveyor General. With this object in view, he will likely accompany me to Fort Ellice.[37]

Christie, accompanied by Dickieson, who was also made a Commissioner to assist Christie, and surveyor William Wagner, arrived at Fort Ellice on the morning of August 24 and stayed until Sunday, August 29, 1875. Christie reported that the Indians at Ellice had much to say, "the 'Gambler' from Qu'Appelle being the chief Orator."[38] In all, 357 Indians were paid on the paysheet headed "Wawasecapow's Band," including one chief, "Wawasecappo," and four headmen, Pasqua, Ota-ma-koo-ewin, Savage, and the Gambler. A note states that 19 of the families listed (97 people) were paid at Fort Qu'Appelle.[39]

In his initial report of September 9, 1875, regarding this meeting, Christie stated that "[t]he Chiefs at [Fort] Ellice were not all decided as to the locality of their Reserves."[40] However, in a subsequent report dated October 7, 1875, Christie and Dickieson indicated that the band had chosen reserve locations. Part of the band wanted a reserve on the Qu'Appelle River, some distance west of Fort Ellice, while the rest of the band had chosen a site nearer to Fort Ellice, at the head of Bird Tail Creek:

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[36] J.S. Dennis, Surveyor General, Memorandum, July 13, 1875, NA, RG 10, vol. 3622, file 5007 (ICC Documents, pp. 48-49). This memorandum was forwarded to Christie by Laird's Deputy Minister, E.A. Meredith, on July 15, 1875: E.A. Meredith, Deputy Minister, Department of the Interior, to W.J. Christie, July 15, 1875 (ICC Documents, p. 57).

[37] W.J. Christie, Indian Commissioner, Treaty 4, to E.A. Meredith, Deputy Minister, Department of the Interior, July 28, 1875, NA, RG 10, vol. 3622, file 5007 (ICC Documents, pp. 64-65).

[38] W.J. Christie, Indian Commissioner, to E.A. Meredith, Deputy Minister, Department of the Interior, September 9, 1875, Provincial Archives of Manitoba (hereafter PAM), MG 12, B1, Alexander Morris, Lieutenant Governor's Collection, No. 1094 (ICC Documents, p. 68).

[39] Treaty Annuity Paylists, Treaty 4 (ICC Exhibit 12, tab 4, pp. 40-3). Sakimay is among the people listed as paid at Fort Ellice rather than Qu'Appelle.

[40] W.J. Christie, Indian Commissioner, to E.A. Meredith, Deputy Minister, Department of the Interior, September 9, 1875, PAM, MG 12, B1, Alexander Morris, Lieutenant Governor's Collection, No. 1094 (ICC Documents, p. 69).

> The question of Reserves has been carefully considered and long interviews held with the Indians on the subject. Many of the Bands have no desire to settle and commence farming, and will not turn their attention to agriculture until they are forced to do so on account of the failure of their present means of subsistence by the extermination of the Buffalo. Others have commenced to farm already, although to a very slight extent, and wish to have their Reserves set apart as soon as possible. Instructions have been given to Mr. Wagner, D.L.S., to survey Reserves for the following bands which are included in this class, viz.:
>
> . . .
>
> 7. Wawaseecappo's Band (58 families) wants their Reserve at the head of the Bird Tail Creek, but as that locality is included in the limits of Treaty No. 2, no decision could be given until the Department had been consulted on the subject. A few families belonging to this Band have been settled for 9 or 10 years at the Round and Crooked Lakes on the Qu'Appelle River about 60 miles from Fort Ellice and as they have made considerable improvements there do not wish to be removed. As we saw no serious objection to this, their wishes were acceded to and instructions given to Mr. Wagner accordingly. There are 7 families living at these lakes.[41]

Wagner was enthusiastic about the Bird Tail Creek location for a reserve:

> I left here in August 1875 and arrived with the Commissioners at Fort Ellice, where, after paying the Indians, the Reserve for this tribe was chosen by them at the head of Bird Tail Creek. Doubts arose amongst the gentlemen of the Commission if the tribe could get their Reserve in a tract of land surrendered under Treaty No. 2 since the Indians under the latter treaty have only 160 acres and the other 640 acres per family of five heads, it was therefore left for your decision.
>
> During this winter the reports of the gentleman entrusted with the Block north west of Riding Mountain towards Shell River, crossing with their lines the heads of Bird Tail Creek, will have been entered at your office and may corroborate my statements expressed in my former report that they are covered with plenty of poplar, spruce and tamarac[k], which easily can be brought down to the Prairie situated between the Riding Mountain and the Assiniboine River for the use of the settlers who will follow any railway brought through this tract of the country.
>
> The Fort Ellice Indians numbering 65 families will probably choose the midst of the woods and occupy nearly 2 townships or 41600 acres.

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[41] W.J. Christie and M.G. Dickieson, Indian Commissioners, to Minister of the Interior, October 7, 1875, PAM, MG 12, B1, Alexander Morris, Lieutenant Governor's Collection, No. 1102 (ICC Documents, p. 83). Wagner later reported that the reserve to be set apart at Qu'Appelle would be headed by Sakimay (Mosquito):

> At the meeting of the Commissioners and the Indians at Qu'Appelle in 1875 it was decided that 7 families of the Fort Ellice Band, under the head of one – Mosquito – should get their Reserve at the Qu'Appelle River near Crooked Lake where they already are domiciled.

William Wagner, Dominion Land Surveyor, to Minister of the Interior, February 19, 1877, NA, RG 88, vol. 300, file 0644 (ICC Documents, p. 131).

> Calculating that only a half will be used for timber and at the rate of 10 cords of firewood and 200 feet of timber (board measure) per acre besides fencing, which I know is a low estimate, will give for the Reserve, when granted, 210,000 cords of firewood and four ½ millions of Lumber sufficient to erect the buildings of 250 Settlers and keep them in wood for 12 years.[42]

As both Christie and Wagner recognized, Bird Tail Creek was situated in the area covered by Treaty 2, which provided for reserves of only 160 acres per family of five – one quarter of the 640 acres per family of five stipulated in Treaty 4. Since the Commissioners were uncertain whether a Treaty 4 band should be permitted a reserve within the geographical limits of Treaty 2, Christie decided to refer the matter to the Minister for a decision.[43] In October 1875, Morris, in his role as Lieutenant Governor of Manitoba and the North-West Territories, gave his opinion that the Band was "entitled to a Reserve of the extent mentioned in Treaty No. 4 and which may properly be given within the boundaries of No. 2."[44]

Although the Minister of the Interior had not yet given his opinion on this issue, the question of reserve land for the Fort Ellice Indians was discussed with the Band in the summer and fall of 1876. In the week of August 3, 1876, Dickieson, Indian Agent Angus McKay, and Wagner were all present at Fort Ellice to pay annuities and discuss reserve selection. However, many of the Fort Ellice Indians were away, some on the prairie hunting buffalo and others, including the Gambler, at Fort Carlton to witness the negotiation of Treaty 6. In his reports, Wagner made only two brief references to the August meeting. In one he stated that "the chief was not prepared to show to me the Point of Commencement of the reserve, but he might be prepared [to do so] when I am finished at Qu'Appelle River and then I shall also survey it during the winter."[45] In the other he said that "the chief of Indians could not decide yet."[46] According to Agent McKay's report on the proceedings, the Fort Ellice Indians were waiting the return of one of their headmen before locating their reserve:

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[42] William Wagner, Dominion Land Surveyor, to Minister of the Interior, January 2, 1876, NA, RG 88, vol. 300, file 0644 (ICC Documents, pp. 105-06).

[43] William Wagner, Dominion Land Surveyor, to Minister of the Interior, January 2, 1876, NA, RG 88, vol. 300, file 0644 (ICC Documents, p. 106).

[44] Alexander Morris, Lieutenant Governor, Manitoba and North-West Territories, to Minister of the Interior, October 23, 1875, PAM, Lieutenant Governor's Collection, Letter Book J, No. 303 (ICC Documents, p. 94).

[45] William Wagner, Dominion Land Surveyor, to Minister of the Interior, October 1, 1876, NA, RG 88, vol. 300, file 0644 (ICC Documents, pp. 121-22).

[46] William Wagner, Dominion Land Surveyor, to Minister of the Interior, February 19, 1877, NA, RG 88, vol. 300, file 0644 (ICC Documents, p.132).

> I arrived at Fort Ellice on the 2nd August and found a great many Indians already there. . . . Mr. Wagner had arrived on the 3rd and on the 5th he and I met the Indians at the Council tent and after a good deal of talking I learned from them that *they did not wish their reserves surveyed for the present as one of their head men was absent*. I then informed them that if such was the case, they would receive no cattle nor anything else except their rations, ammunition, twine and tobacco as the treaty provided that until they had their reserves marked out and had stables and hay for the cattle they were not to get any. . . .
>
> I will now proceed to deal with the subject of Bands & their reserves. . . .
>
> 2nd. A small reserve has been already surveyed by Mr. Wagner for seven families of the Fort Ellice band [under Sakimay] on the North side of the Qu'Appelle at the head of the Crooked Lake. These families have always lived and hunted there and have built a few houses, cultivated some land and are all living on their reserve. . . .
>
> 19th. Chief Wa-wa-zhe-ga-bow [Waywayseecappo] or Standing in Readiness. This Indian is a Saulteaux as well as all his band with the exception of two or three families who are half-breeds. They number 50 families including 7 [under Sakimay] who have got their reserve on the Crooked Lake on the Qu'Appelle river. The greater number of this Band roam on the Prairie hunting Buffalo and very little is done by any of them in the way of farming. Some of them have houses but very few cattle and *this band for reasons already stated did not point out the spot where they desired their reserve*. . . ."[47]

According to the paylists, the only headman absent in 1876 was the Gambler, who received his annuity at Fort Carlton.

With the Fort Ellice Band unwilling to commit to a reserve location, Wagner left to complete a number of surveys for other Treaty 4 bands. Finally, on his way to Fort Pelly in mid-December, Wagner stopped again at Fort Ellice to see if the Band was prepared to identify the preferred location for its reserve lands. However, nothing had changed, a situation that Wagner attributed directly to the Gambler:

> At Ellice, the Chief of Indians could not decide yet . . . in passing [I] tried the Chief of Fort Ellice Indians but of [sic] no avail. There are several houses where the chief lives, they keep cattle, have gardens and yet they are tampered with by the intrigues of one man – the [G]ambler – who hopes perhaps to get something more advantageous out of the Government, but since Mr. McKay is appointed Agent it may be expected he will explain this "[G]ambler" his situation properly.[48]

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[47] Angus McKay to Superintendent General of Indian Affairs, October 14, 1876, NA, RG 10, vol. 3642, file 7581 (ICC Exhibit 12, vol. 2, tab 25, pp. 10, 12, 30-31, 48). Emphasis added.

[48] William Wagner, Dominion Land Surveyor, to Minister of the Interior, February 19, 1877, NA, RG 88, vol. 300, file 0644 (ICC Documents, p. 136).

In October 1876, David Laird resigned as Minister of the Interior to assume new duties as the first Lieutenant Governor of the North-West Territories. In December, he was given the additional appointment of Indian Superintendent for the region, and M.G. Dickieson was named his assistant. Writing from his headquarters at Swan River in May 1877, Laird reported that he had interviewed the Chiefs and headmen of three bands, including Waywayseecappo's, about the location of their reserves. He agreed with Morris that the selection of land by Waywayseecappo at the head of Bird Tail Creek should be approved notwithstanding its location within Treaty 2 territory, and asked that the government's decision be conveyed to him:

> Since my arrival here, I have had interviews with the Chiefs and principal men of three Indian Bands under the above Treaty, the location of whose Reserves has not yet been decided. You will find the Reserves of these Bands referred to in Messrs. Christie and Dickieson's report, page xxv of the Departmental Report of 1875.
>
> The delay in locating the Reserves of these Bands has been caused by disagreement among their members in making a selection. They appear to have settled their disputes and expressed to me that they wish their Reserves to be located as follows:
>
> 1. 'Wawasecappo's, or the Fort Ellice Band.' Their selection is pretty much as mentioned in Messrs. Christie and Dickieson's report [of October 7, 1875]. They desire a Reserve to be surveyed for them at the head of Bird Tail Creek, on the road leading from Swan Lake via Shell River, used by the North West Mounted Police in travelling to Swan River Barracks. The site is about 24 miles from Shoal Lake, and about 36 miles from the mouth of the Shell River. They would prefer to have the Reserve on both sides of the Bird Tail Creek, but will, I trust, be content to have it all on the West side.
>
> I know of only two objections to this selection – first, that it is within the limits of Treaty 2; secondly, that it is in Territory covered by the Block Surveys. The former objection, I consider of no weight, as the Government must give the granting of land somewhere in the Territories. The second in my opinion should not be urged. The Townships there, as I understand, have not been sub-divided, consequently if a Reserve were surveyed within the Block limits, the sub-division need never take place, so far as the area of the Reserve is considered. . . .
>
> It is very desirable that I should be informed whether or not the location of these Reserves is approved by the Government, in order that the Bands may be notified at the time of this summer's annuity payments. If approved they ought also to be surveyed as soon as possible.[49]

Surveyor General Dennis agreed with Laird's recommendation. David Mills, the Superintendent General of Indian Affairs, approved the location of the reserves as set out in Laird's report, and directed that they be surveyed.[50] Instructions to conduct these surveys were evidently conveyed to Wagner on June 13, 1877.[51]

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[49] David Laird, Lieutenant Governor and Indian Superintendent of the North-West Territories, to Minister of the Interior, May 9, 1877, NA, RG 10, vol. 3649, file 8187 (ICC Documents, pp. 141-44).

Wagner and his survey party arrived in Fort Ellice later that month, after discussing various reserve surveys with Laird in Livingstone. Wagner's report on the survey of Waywayseecappo's reserve is brief, but it clearly indicates that the Chief and at least one other band member were actively involved in selecting the site:

> I then returned to Ellice where after several interviews with the Fort Ellice Chief, who sent a man with me to show to me the place and according to their wishes I have surveyed their Reserve. . . . I had made the Reserve 6 miles by 11½ miles . . .[52]

Wagner's diary indicates that, on June 27 and 28, he met with Waywayseecappo, who was ill. The Chief appointed a guide to point out the desired area, and on June 29 Wagner left for Bird Tail Creek with the guide and interpreter. It is not clear whether the guide remained throughout the survey, but Wagner apparently had instructions to survey a particular area; he recorded on July 13 that the original eastern boundary marked out by him did not include "the place wished for" and the following day he moved the boundary eastward:

> Wednesday 27th [June 1877] – Met the Chief Wa-was-a-cappo or Fort Ellice Chief.
> Thursday, 28th – Meeting with Indians in the Chief's Tent, who is very sick. Robillard interpreter. It was agreed that a guide should show to me what they want & where.
> Friday, 29th – Started with Indian Guide and Interpreter to the Police Crossing of the Bird Tail Creek.
> Saturday, 30th – Returned to Ellice, two of my carts which were broken in the bad roads arrived.
> Monday, 2nd day of July 1877 – Started for the survey with my party.
> Tuesday, 3rd – Travelling, arriving at the 5th Correction line.
> Wednesday, 4th – Running Trial line to see where the Crossing is situated – 140.00 chs.
> Thursday, 5th – Prepared the South West Corner of Reserve, Thunderstorm begins at 2 o'clock – 300.00 chs. . . .

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[50] David Mills, Superintendent General of Indian Affairs, to J.S. Dennis, Surveyor General, June 4, 1877, NA, RG 10, vol. 3649, file 8167 (ICC Documents, p. 145).

[51] William Wagner, Dominion Land Surveyor, to Minister of the Interior, August 23, 1877, NA, RG 88, vol. 300, file 0644 (ICC Documents, p. 146).

[52] William Wagner, Dominion Land Surveyor, to Minister of the Interior, August 23, 1877, NA, RG 88, vol. 300, file 0644 (ICC Documents, pp. 147-48).

> Friday, 13th – Began the East boundary, surveyed it for 150.00 chains when I found out that the place wished for was not in it.
>
> Saturday, 14th – Began [illegible] miles east of this line on Correction line and ran up 240.00 chs. . . .
>
> Thursday, 26th – Left Party to chain up Baseline and to finish that part of the East boundary where I was interrupted by Bird Tail Creek.
>
> Friday, 27th – Arrived at Ellice with one man to go to Pelly to see about the next Reserve. . . .
>
> Tuesday, 31st – Arrived at Pelly, saw the Lt. Governor who told me that Hard Quill had settled at the Qu'Appelle River and therefore not advisable to survey as bespoken last year. . . .
>
> Friday, 3rd [August] – Arrived at Ellice.
>
> Monday, 6th August – My party arrives from the Reserve at Bird Tail Creek. The "Gambler" comes to me to have the boundary changed.[53]

We will return to the details of the exchange that took place between the Gambler and Wagner below. For the moment, it is sufficient to state that the survey plan, completed in September 1877, showed 45,869 acres (71.67 square miles) of "Fine undulating Prairie with Hayswamps and Poplar bluffs, Soil Class one" in Townships 19 and 20, ranges 25 and 26, west of the principal meridian.[54] Bird Tail Creek meanders through the eastern portion of the reserve, and there are ponds and lakes at various places throughout the reserve.

Treaty 4 stipulated that the size of reserves would be determined according to a formula of one square mile for each family of five, "or in that proportion for larger or smaller families."[55] At 71.67 square miles the Bird Tail Creek reserve provided enough land for 358 people. The Bird Tail Creek reserve is also known as Lizard Point Indian Reserve 62.

INDIANS PAID UNDER CHIEF WAYWAYSEECAPPO AT FORT ELLICE

Wagner did not indicate in his report how he determined the Fort Ellice Band's population for calculating the size of the reserve at Bird Tail Creek.

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[53] William Wagner, Dominion Land Surveyor, "Diary of Surveys of Indian Treaty No. 4 from 19 February 1877 to 26 February 1878," January 26, 1878 (ICC Exhibit 12, vol. 1, tab 3).

[54] Survey Plan CLSR 2949, "Wa Was A Cappo's Band, Bird Tail Creek, surveyed during July 1877 by William Wagner, D.L.S., September 1877" (ICC Documents, p. 150). Note that the acreage reported does not appear to correspond with the survey plan. The Indians later maintained that they were to have a reserve of 12 miles by 6 miles, which would roughly correspond to the 71.67 square miles reported. However, the survey plan shows a reserve of 11 ½ miles by 6 miles – the figure used when the reserve was surrendered for exchange in 1883 – which equals 69 square miles.

[55] *Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice* (Ottawa: Queen's Printer, 1966), 6.

The treaty annuity paylists indicated that 371 people were paid with Waywayseecappo at Fort Ellice in August 1877, and another 31 were absent but paid arrears when they returned in 1878 and 1879, for a total membership of 402.[56]

However, as the Commission has remarked in its reports dealing with previous treaty land entitlement inquiries, treaty annuity paylists were merely financial forms designed to account for the annuities paid to treaty Indians to meet Canada's obligations. Although the paylists record the names of heads of families and the number of people in each family, they were never intended to provide accurate census records and are not necessarily reliable indicators of band structures or the places of residence of individuals or groups. In the case of Waywayseecappo's paylist, the evidence shows that officials included people regardless of their known place of residence. In 1881, four years after the survey of the Bird Tail Creek reserve, separate paylists were established for five groups previously paid together under Waywayseecappo at Fort Ellice: Waywayseecappo, Sakimay, South Quill, Rattlesnake, and the Gambler.[57]

There is evidence that three of these groups – Sakimay, South Quill, and Rattlesnake – had had houses and gardens at locations some distance from Fort Ellice for many years prior to the Treaty 4 negotiations, that they continued to live at these locations after the treaty, and that they could not be convinced to move to the Bird Tail Creek reserve. Sakimay had a reserve surveyed at Crooked Lake in 1876 and the other two groups were eventually recognized as distinct bands and received reserve land at their chosen locations. There is no similar evidence relating to the Gambler before the Commission in this inquiry. The following provides a brief discussion of these groups and their relationship with the Waywayseecappo Band.

Sakimay

Sakimay, or the Mosquito, and his followers resided at Crooked Lake, about 65 miles along the Qu'Appelle River west of Fort Ellice. From her research of Hudson's Bay Company records, Jaye Goossen of Manitoba's Department of Tourism, Historic Resources Branch, identified Mosquito as being "among the Indians who enjoyed a regular trading arrangement at Fort Ellice in the 1860s, coming in together annually from the plains to trade furs and provisions"[58] Sakimay had asked the Commissioners in 1875 to have reserve land where he lived on the Qu'Appelle River at Crooked Lake, and in August 1876 Wagner and his crew surveyed a reserve of 4691 acres at that location. If Wagner had factored the Sakimay reserve into his calculations for the Bird Tail Creek reserve, the total acreage reserved would have been enough land for 395 people under the terms of treaty.[59]

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[56] Jim Gallo, Manager, Land Entitlement and Claims, Department of Indian Affairs, "Research Memorandum – Gamblers Band Treaty Land Entitlement," January 31, 1997 (ICC Exhibit 12, vol. 1, tab 1, p. 14).

[57] On the other paylists established for these groups, each individual retained the same number as when paid with Waywayseecappo (i.e., No. 34 Waywayseecappo became No. 34 Gamblers). No new Chiefs or headmen were created; two of the four headmen were listed on Rattlesnake's paylist and the other two on Gambler's (Treaty Annuity Paylists, 1880 and 1881, ICC Exhibit 2, pp. 251-66). In 1882 Rattlesnake combined with Gambler and did not get a separate paylist again until 1893.

South Quill

In June 1881, Alan McDonald, the Indian Agent for Treaty 4, reported that Sha-wa-ne-qua-nape ("South Quill") and his followers had been included in the allocation of reserve land for Waywayseecappo at Bird Tail Creek, but that they immediately afterwards began to ask for a separate reserve at Rolling River, about 45 miles east of Fort Ellice:

> Sha-wa-ne-qua-nape or "South Quill" has been a member of Way-way-see-cappo's Band (that is his name and those families who follow him were in the Pay sheet of that Chief) when I took charge of this Treaty.
>
> He as well as Sakamey of the Crooked Lake always objected taking their presents with the Chief. In Sakamey's case, on account of a special Reserve having been granted to him, I gave his Powder, Shot &c and his provisions separately. In Sha-wa-ne-qua-nape's case, I always handed his presents to the Chief, but he and his party always spoke separately from the Chief, and took their payments immediately after.
>
> All the Indians who accepted the Terms of the Treaty at Fort Ellice with the exception of Sakamey with I think 15 families have had [illegible] miles square allotted to [them] in what is known as Way-way-[see-cappo's] Reserve on the Bird Tail Creek.
>
> For the last two years Sha-wa-ne-qua-nape and Ootah-ne-qua and "old blind [illegible]" of his party have asked for a Reserve at the Rolling River. I have always told them, I had not the power of granting them another Reserve and also I thought the land they were applying for was already taken by White man.
>
> If it could be arranged I would strongly recommend that he and his party of 17 families or 78 souls be granted a special Reserve and get Way-way-see-cappo to surrender the same extent of his.
>
> These Indians have not been on the best of terms with the Chief and I do not think they will settle down until an arrangement of this kind is come to.[60]

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[58] N. Jaye Goossen, Historic Resources Branch, Department of Tourism, Manitoba, "Indians of the Fort Ellice Region," March 1976, p. 20 (ICC Exhibit 2, p. 79).

[59] 4691 acres for Sakimay at Crooked Lake + 45,869 acres for the "Fort Ellice Band" at Bird Tail Creek = 50,560 acres + the treaty formula of 640 acres per family of five = 79 square miles x 5 people per square mile = sufficient land for 395 people.

[60] A. McDonald, Indian Agent, Treaty 4, Ellice, NWT, to Department of Indian Affairs, Ottawa, Ontario, June 26, 1881, NA, RG 10, vol. 3754, file 30848 (ICC Documents, pp. 270-71).

A subsequent inquiry by A.J. Belch, the Dominion Land Agent at Birtle, Manitoba, disclosed that South Quill and his followers had occupied the Rolling River area "as hunting grounds for fully fifty years."[61] Indian Agent L.W. Herchmer endorsed Belch's comments,[62] having relayed in an earlier letter the comments of a "Frenchman (Treaty) who had lived there for over 20 years . . . that 'South Quill' when? he first made a Treaty with Gov. Morris, named the mouth of Rolling River, and the land along that stream for his Reserve."[63]

In August 1882, the Dominion government set apart approximately 12,000 acres (18¾ square miles) for the band at Rolling River, although this reserve was not confirmed by Order in Council until September 22, 1893.[64] An equivalent amount of land was not surrendered from Waywayseecappo's reserve as suggested by Agent McDonald in 1881.

Rattlesnake

Rattlesnake and his followers were counted among Waywayseecappo's followers when land was set aside at Bird Tail Creek in 1877. As will be discussed at greater length below, they were also among the group of people associated with the Gambler who purported to surrender 32 square miles of land in the Bird Tail Creek reserve in 1881 for an equal amount at Silver Creek. Nevertheless, Indian Commissioner Hayter Reed reported in December 1889 that a "considerable portion who although allowed for when that reserve [the Gambler's] was surveyed, were at the time residing at Valley River . . . and had been settled there continuously for some thirty years previously."[65] Five years later, Canada surveyed an area of 18.25 square miles as IR 63A for Rattlesnake in the Valley River district between Riding and Duck Mountains, about 120 miles northeast of Fort Ellice, including 15 square miles in exchange for an equivalent area which was apparently surrendered from the Gambler's reserve on September 15, 1892. The Commission makes no findings regarding the validity of this surrender or any other surrenders involving Gambler's reserve land.

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[61] A.J. Belch, Dominion Lands Agent, NWT, to A.M. Burgess, Secretary, Department of the Interior, Ottawa, Ontario July 13, 1882, NA, RG 10, vol. 3754, file 30848 (ICC Documents, p. 322).

[62] L.W. Herchmer, Indian Agent, to A.M. Burgess, Secretary, Department of the Interior, July 13, 1882, NA, RG 10, vol. 3754, file 30848 (ICC Documents, p. 327).

[63] L.W. Herchmer, Indian Agent, to Superintendent General of Indian Affairs, October 24, 1881, NA, RG 10, vol. 3754, file 30848 (ICC Documents, pp. 290-91).

[64] Jim Gallo, Director, Treaties & Aboriginal Rights Research Program, Four Nations Confederacy, "Waywayseecappo I.R. No. 62, Gambler's I.R. No. 63 and Rolling River I.R. No. 67, Treaty Land Entitlement Report," May 6, 1981 (ICC Exhibit 2, pp. 36-37).

[65] Hayter Reed, Indian Commissioner, to Deputy Superintendent General of Indian Affairs, December 11, 1889, NA, RG 10, vol. 6654, file 106A-3-1-1 (ICC Exhibit 12, vol. 2, tab 10, pp. 1-2).

The Gambler

The fourth group to receive a discrete paylist, and a separate reserve from Waywayseecappo, was led by the Gambler. Unlike the people associated with Sakimay, South Quill, and Rattlesnake, however, there is no evidence that the Gambler and his followers lived at or occupied a particular location separate from Waywayseecappo before Treaty 4 in 1874 or the 1877 survey at Bird Tail Creek. According to research compiled by the First Nation, the Gambler was the eldest son of Peicheto, "a prosperous Indian trader and influential sub-Chief of the Portage Band during the 1850s and 60s"; he was also the grandson of John Tanner, a white captive of the Shawnee from Kentucky who had come to the Red River area with his adopted Ottawa mother, Netnokwa, and "grew up to be a much renowned hunter and Chief of one of the many Saulteaux Bands in the Red River country during the early 1800s."[66] Jaye Goossen's study of Hudson's Bay Company records discloses that the Gambler "visited Fort Ellice only infrequently, preferring to take most of his business to Fort Pelly."[67] According to the Gambler's own statement, he gathered Indians from the prairies to come to Fort Ellice and join "our Chief" Waywayseecappo:

> when Way-way-see-cappo was made Chief he gave me authority to go throughout all the plains, to collect all the Indians who belonged to Fort Ellice to join this Band. I went out, and made as many as I saw, understand that they were invited to come and join our Chief, having collected three hundred persons, including those who were here before we held councils. . . .[68]

Although the record is clear that the Gambler was a headman of Chief Waywayseecappo's Band in 1877, the Gambler's dissatisfaction with the survey at Bird Tail Creek ultimately led to the proposal for a surrender for exchange of reserve land in 1881 to establish a separate reserve for the Gambler and his followers.

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[66] Jim Gallo, Director, Treaties & Aboriginal Rights Research Program, Four Nations Confederacy, "Waywayseecappo I.R. No. 62, Gambler's I.R. No. 63 and Rolling River I.R. No. 67, Treaty Land Entitlement Report," May 6, 1981 (ICC Exhibit 2, p. 46 n1).

[67] N. Jaye Goossen, Historic Resources Branch, Department of Tourism, Manitoba, "Indians of the Fort Ellice Region," March 1976, p. 19 (ICC Exhibit 2, p. 78).

[68] A. McDonald, Indian Agent, Treaty 4, "Proceedings of a Council of Way-way-see-cappo's Band convened by the Chief and held in the Reserve, Bird Tail Creek," February 24, 1881 (ICC Documents, pp. 253-54).

GAMBLER'S DISCONTENT WITH LOCATION OF BIRD TAIL CREEK RESERVE

On July 28, 1877, Wagner left his crew to complete the Bird Tail Creek survey while he made arrangements for subsequent surveys. On August 6, the same day that Wagner's survey party returned and joined him at his camp near Fort Ellice,[69] the Gambler visited him to express his concerns about the survey at the Bird Tail Creek reserve. In a progress report on the summer's survey work, Wagner noted:

> After having finished I went into Camp near Fort Ellice to wait for the arrival of White Bear.
>
> During this time, an Indian belonging to the Fort Ellice Band – the "Gambler" – came to me to ask me to resurvey their Reserve, their Chief having done without his approval. I had made the Reserve 6 miles by 11 ½ miles [69 square miles] but he wished it to be 4 miles by 18 miles [72 square miles] and have the Reserve shifted 3 miles more East.
>
> Knowing the Gambler to be one of the most troublesome Indians in Treaty No. 4, who also went to Carleton last year to make trouble during the Treaty there, and he not being able to give me a good reason for the change I left it as I had done.[70]

In December 1877, the Indian Agent for Treaty 4 also reported that Chief Waywayseecappo and his headmen were dissatisfied with the reserve and wanted something different than Wagner had set apart for the band:

> Wawaseecappo's Band have their Reserve on Bird Tail Creek, but he and his Head men are dissatisfied with some of the land included in it, what they want is to have their Reserve about forty miles long and two or three wide, which I informed them I did not think it will be allowed.[71]

Three months later, in a letter to the Surveyor General dated March 26, 1878, Wagner provided additional details:

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[69] William Wagner, Dominion Land Surveyor, "Diary of Surveys of Indian Treaty No. 4 from 19 February 1877 to 26 February 1878," January 26, 1878 (ICC Exhibit 12, vol. 1, tab 3).

[70] William Wagner, Dominion Land Surveyor, to Minister of the Interior, August 23, 1877, NA, RG 88, vol. 300, file 0644 (ICC Documents, p. 148)

[71] A. MacDonald, Indian Agent, Treaty 4, to Deputy Minister of the Interior, December 28, 1877, NA, RG 10, vol. 3654, file 8904 (ICC Documents, p. 155). It is of some interest to note that, in the summer of 1876, Wagner had to convince Mosquito/Sakimay that he would not survey a reserve of similar dimensions:

> His [Sakimay's] idea of extent of Reserve differed materially with the reality (he wished to have it 40 miles along the River) but after I had explained to him the situation and seeing me determined to go on with the work he yielded and was reasonable.

William Wagner, Dominion Land Surveyor, to Minister of the Interior, February 19, 1877, NA, RG 88, vol. 300, file 0644 (ICC Documents, p. 133).

> As regards to the Reserve for Wa-wa-see-capo at Bird Tail Creek, plan of Reserve given by me to Mr. Whitcher in September last, I beg to repeat again that I have laid out the Reserve according to the wishes of the chief, who sent his son in law with me, and the Government Interpreter – Robillard – was with us, but when one of the Councillors named Gambler returned he, probably to show me his influence, wished to move the Reserve 4 miles more West, to have it 4 miles wide and 18 miles long, which would have excluded all the improvements made by the Chief and his families. I proposed to him to move 4 miles East but would not give 18 miles in length, which he refused. Since then he left word with Mr. A. McDonald at Fort Ellice that they will be satisfied with a reserve 12 miles by 6 miles. I could not change it since Plan and field notes were entered – except I shall be empowered to do so by you.[72]

Mr Patrick Tanner stated at the community session that, in his opinion, the difficulty with the location of the Bird Tail Creek reserve arose because Wagner exceeded his authority in surveying the reserve:

> The surveyor Wagner, in my view did not listen to the Indian people, or he did not listen to his bosses, or whatever, from Canada, whoever his boss was, because Gambler had selected, and Wagner put it where he figured it should be. And it was agreed at the meeting that Gambler was to select this reserve, not Wagner. It seems like Wagner went ahead and made decisions on his own.[73]

There is no further reference on the record to the dissatisfaction of the Gambler and his followers with the Bird Tail Creek reserve until November 1880. At that time, Agent McDonald, apparently responding to correspondence concerning white settlers who had moved onto land in the southern portion of Waywayseecappo's reserve,[74] referred to Gambler's desire to relocate as a means of making the land available for the settlers. According to McDonald, Gambler and about 30 families had already moved and built houses at their new location:

> Your letter respecting the land taken up by the Sharmans on Waywayseecappo's Reserve has not been overlooked by me. Indians are to be handled differently from

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[72] William Wagner, Dominion Land Surveyor, to J.S. Dennis, Surveyor General, March 26, 1878, NA, RG 88, vol. 300, file 0644 (ICC Exhibit 12, vol. 4, tab 31, pp. 2-3).

[73] ICC Transcript, November 5, 1996, p. 13 (Patrick Tanner).

[74] From the material supplied to the Commission, it is impossible to tell the complete story about these settlers. In 1884, Hayter Reed advised the Superintendent General "with reference to the survey of the surrendered part of Way-way-see-cappo's Reserve on Bird Tail Creek, & to inform you that Mr. Ponton was instructed to make the survey & a plan was furnished him on which was shewn what changes it would be desirable to make in the interest of & at the request of the Department of the Interior who had I believe permitted some parties to enter for homestead on the south part of the Reserve & therefore wished a further surrender of that part." Hayter Reed, Acting Assistant Indian Commissioner, to Superintendent General of Indian Affairs, April 14, 1884, NA, RG 10, vol. 6654, file 106A-3-1 (ICC Documents, pp. 376-77).

> white men and I wished the application of the change to come from them. This has been the source of the delay. Another reason, the Chief is simple so I had to wait until I met the Gambler, one of his headmen. He is with me just now and the whole affair can be settled in this way.
>
> He and about 30 families have applied to be allowed to part from the Band and be allowed to take a Reserve . . . six by five miles north of Ellice, East side of the Assiniboine in Range 29 Township 18 commencing a little below a creek opposite the Red Deer Horn Creek as shown in map 1878. There are no settlers on it, but the Gambler and his party has [sic] six houses built on it.
>
> If this arrangement is agreeable to you, let me know as soon as possible, addressing your letter to Fort Ellice as I will be here again in four or five weeks.
>
> Mr. Armstrong D.L.S. is at present subdividing in the Range & Township the Gambler wants and it will be advisable (after the Band in Council votes the surrender of Thirty square miles of their present Reserve) to survey this Reserve.
>
> I strongly recommend this change as it will not only settle the Sharman claim, but will also settle the minds of discontented Indians, Indians who do not wish to remain with their present Chief.[75]

Two months later, on February 1, 1881, the Minister of the Interior asked Indian Commissioner Edgar Dewdney to review the file "respecting certain lands taken up by the Sharman family of Chief 'Wayzeecappoe's' Reserve, Bird Tail Creek, and the desire of the 'Gambler,' one of the Chief's Councillors to remove with 30 other families to a location 65 miles north of Ellice, on the East side of the Assiniboine." Agent McDonald had telegraphed and was waiting at Swan River Barracks for a decision.[76] After discussing the question with Inspector Wadsworth and reviewing a plan of the reserve, Dewdney recommended that *30 square miles* be surrendered from the southern portion of Waywayseecappo's reserve. It was Dewdney's opinion that "the Indians will not be disturbed in their improvements, and the land claimed by 'Sharman' will be surrendered."[77] This letter was forwarded to McDonald on February 9, 1881, with advice that a surveyor would be instructed to contact him to identify the *32 square miles* to be surrendered, as well as the land to be set apart as the Gambler's new reserve on the Assiniboine River.[78] There is no apparent explanation in the record for the discrepancy between Dewdney's recommendation that 30 square miles be surrendered and the Minister's approval for a surrender of 32 square miles. At any rate, the Commission makes no findings or conclusions in regard to whether this discrepancy may constitute a valid basis for a separate claim.

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[75] A. McDonald, Indian Agent, Treaty 4, to L. Vankoughnet, Deputy Superintendent General of Indian Affairs, November 21, 1880, NA, RG 10, vol. 6654, file 106A-3-1, mfm reel C-8045 (ICC Documents, pp. 226-27).

[76] [Minister of the Interior] to Edgar Dewdney, Indian Commissioner, February 1, 1881, NA, RG 10, vol. 6654, file 106A-3-1 (ICC Documents, pp. 228-29). McDonald's telegram was not among the documents supplied to the Commission.

[77] Edgar Dewdney, Indian Commissioner, to Minister of the Interior, February 2, 1881, NA, RG 10, vol. 6654, file 106A-3-1 (ICC Documents, pp. 230-31).

[78] [Minister of the Interior] to Lt. Col. A. McDonald, Indian Agent, February 9, 1881, NA, RG 10, vol. 6654, file 106A-3-1 (ICC Documents, p. 232).

SURRENDER FOR EXCHANGE IN 1881

On February 24, 1881, Agent McDonald travelled to the Bird Tail Creek reserve at the invitation of Chief Waywayseecappo. He and an interpreter, Peter Hourie, met with 23 male members of the Band of "the full age of twenty-one years," who had assembled there expressly to discuss the proposal to surrender part of the reserve so that the Gambler and his followers could establish their own reserve. According to Wagner's account of the council meeting, the Gambler explained to one of the councillors why he had complained about Wagner's survey of Bird Tail Creek reserve in 1877:

> The Gambler answered, "You ask me the reason why I want to leave the Reserve, I will make you understand, my reason is this, when Way-way-see-cappo was made Chief he gave me authority to go throughout all the plains, to collect all the Indians who belonged to Fort Ellice to join this Band. I went out, and made as many as I saw, understand that they were invited to come and join our Chief, having collected three hundred persons, including those who were here before we held councils, when I was choosen [sic] to select the place for our Reserve, this I did; it was also agreed that when the survey was made, I was to accompany the surveyor and show him what we wanted. At the time he came, I had other important matters to attend to, so the Chief took him to the place. It was not exactly the place I had selected. I was told before that the Reserve was to be 12 x 6 miles. The Reserve was to have been on both sides of Bird Tail Creek instead of which it was put three miles too far west. Out of the three hundred persons I had collected, a large number were dissatisfied with the Reserve. They said they would not work on the Reserve, as it did not suit them. I told them stop first, I will speak to the Chief, and let him know of this: some of the party who spoke to me as dissatisfied were, Savage, Headman, Pisqua, Head Man, Ka-ka-quash and New-tin. I told them the Chief and I made arrangements before that if any of the Band did not like to stop on the Reserve, we would let them go where they thought the[y] would do better.
>
> To the Chief did we not say that. –
>
> Answer yes we did say so. –
>
> I [the Gambler] then asked the Agent if we could not get another Reserve.
>
> I have not got the answer from the Agent yet, if we will be granted what we are asking for; and I do not like to be refused by the Band what I think will be allowed by the Government, so if it will suit the Chief, and the members of the Band in Council,

> we will give up to the Government Thirty-two (32) square miles of the south end of our Reserve. For my part I am willing.[79]

At this council, consistent with the Gambler's request and McDonald's instructions from the Minister of the Interior, the proposal was to surrender 32 square miles, and the discussion about which part of the Bird Tail Creek reserve to surrender went well into the night. Dewdney's proposal to cut off the entire south part of the reserve "would have deprived the Band of nearly all their prairie lands"[80] and was rejected in a vote, by "a majority of one." McDonald in turn rejected the Band's counterproposal that the land be taken in a strip along the entire west side of the reserve, ostensibly because "it would destroy their Reserve" but perhaps because it would not have included the land claimed by the Sharman family. In the end, McDonald reported that the Band agreed to a compromise which included all the land east of Bird Tail Creek in the southern portion and the remainder from both the northern and southern boundaries of the reserve, for a total area of 32 square miles:

> On the vote being taken there was a majority of one, against giving up the south end.
>
> The Chief proposed giving up three (3) miles on the west side from north to south, which I told them I could not allow, as it would destroy their Reserve.
>
> I told the Band I regretted very much that they were unable to come to a settlement. If they would allow me, I would propose what portion of the Reserve I thought would be the best for them to surrender, but they must understand it rested with them altogether, viz. That portion of the Reserve east of Bird Tail Creek from the south boundary to within a mile or so of the Agency Farm making the Creek the eastern boundary of the Reserve south of the agency farm, what ever more is required to make up the 32 square miles is to be taken from the north end of the Reserve but not farther south than the northern boundary of the agency Farm and should [there be] more required, then from the south end.
>
> As it was passed [sic] midnight and it would take more time to consider over my suggestion, I hoped they would give me an answer the next morning.
>
> After some talk amongst themselves, the Chief rose and said, the whole thing was settled. He said all the Band would surrender what I had proposed and that he and his Head men would sign the papers whenever required to do so.
>
> I certify that this is a correct report of the process.[81]

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[79] A. McDonald, Indian Agent, Treaty 4, "Proceedings of a Council of Way-way-see-cappo's Band convened by the Chief and held in the Reserve, Bird Tail Creek," February 24, 1881 (ICC Documents, pp. 254-55).

[80] A. McDonald, Indian Agent, Treaty 4, to L. Vankoughnet, Deputy Superintendent General of Indian Affairs, February 28, 1881, NA, RG 10, vol. 6654, file 106A-3-1 (ICC Documents, p. 257).

[81] A. McDonald, Indian Agent, Treaty 4, "Proceedings of a Council of Way-way-see-cappo's Band convened by the Chief and held in the Reserve, Bird Tail Creek," February 24, 1881 (ICC Documents, pp. 255-56).

Surrender No. 183 was signed at Fort Ellice by Wa-wa-se-capow (Waywayseecappo), Oo-ta-ka-wenin (the Gambler), and Sauvage on March 7, 1881. This document stated that the boundaries of the Bird Tail Creek reserve "on the north and east sides" should be altered so as to surrender a total of "30 square miles":

> Whereas, in fulfilment of the provisions of "certain articles of a Treaty" made and concluded at Qu'Appelle, in the said Territories, bearing date the fifteenth day of September, in the year 1874, known as the Qu'Appelle Treaty No. 4, to which treaty the said Wa-wa-se-capow's Band became parties by an instrument in writing, dated and executed at Fort Ellice, in the said Territories, on the twenty-first day of September aforesaid, certain lands in the said Territories, of which the lands hereinafter described form part, have been duly assigned as a reserve for the said band of Indians.
>
> And whereas, since the assignment thereof as aforesaid it has been found more convenient and for the interests of the said Band of Indians that the boundaries of the said reserve on the north and east sides thereof should be altered, and in lieu of the lands (hereinafter described) by such alterations of boundaries excluded, other lands of equal extent assigned to the said Band.
>
> And whereas, at a meeting or council of the said Band, summoned for the purpose, according to their rules, and held on the twenty-fourth day of February, in the year 1881, at the said reserve, in the presence of Allan Macdonald [sic], Esquire, duly authorized to attend such council or meeting by the Superintendent-General of Indian Affairs, pursuant to the requirements of section 37 of the *Indian Act*, 1880, the assent of the majority of the male members of the said Band of the full age of twenty-one years, for the surrender to Her Majesty of the lands hereinafter described, has been given.
>
> NOW KNOW YE, that we, the said Wa-wa-se-capow, Oo-ta-ka-wenin, and Sauvage, as Chief and Headmen as aforesaid, representing the said Band of Indians, and for and in the name of the said Band, for the object and purpose above set forth, do hereby release, surrender and yield up to Her Majesty, all that portion of the said reserve, as it now exists and is defined, lying to the eastward of the Bird Tail Creek, extending from its southern boundary, northwards to a point from which a line drawn east and west will intersect the southern boundary of school section eleven of township twenty, ranged twenty-five, west of the principal Meridian, and also so much of the northerly part of the said reserve, across the same, as, with the portion thereof hereinbefore described, will when surveyed and measured, contain in all thirty square miles.
>
> To hold the same to Her Majesty, Her heirs and assigns forever.[82]

The required affidavit, attesting that "the surrender hereto annexed has been assented to by the Band in the said surrender named at the council or meeting of the said Band, as set forth in the said surrender," was sworn by McDonald and Waywayseecappo at Fort Ellice before Hugh Richardson, a stipendiary magistrate for the North-West Territories.[83] The surrender was approved by Order in Council PC 654 dated April 27, 1881, which stated that the surrender covered "thirty sections of their Reserve on Bird Tail Creek, in consideration of another Reserve of equal area being assigned them at a more suitable point."[84]

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[82] Surrender No. 183, March 7, 1881 (ICC Documents, pp. 260, 264-66).

SURVEY OF LIZARD POINT AND SILVER CREEK RESERVES

When surveyor John C. Nelson passed through Fort Ellice in April 1882, the Gambler met him and urged him to go and mark out the boundaries of the reserve to be set apart for the Gambler and his followers. Nelson agreed to do so, if it was possible, but by the time horses were brought down to transport him to the site, the ice on the river was unsafe and Nelson did not go.[85]

The first survey of the surrendered portion of Waywayseecappo's reserve was performed by P.H. Dumais, Dominion Land Surveyor, in the summer or fall of 1882 under the direction of the Department of the Interior rather than the Department of Indian Affairs. Dumais reported that the part of the reserve east of Bird Tail Creek contained only 4⅜ square miles and, if he had taken the balance of the 30 square miles entirely from the northerly part of the reserve "as per surrender," Indian houses and improvements would have been included. Because of this, the Chief had asked him to leave before the survey was completed and Dumais had complied.[86]

Dumais proposed to take land from both the north and south portions of the reserve so that the entire 30 square miles could be cut off without disturbing the Indian settlement. The Department of Indian Affairs initially objected to Dumais's proposal because it was not "in accordance with the deed of surrender."[87] Instead, the Department elected to conduct its own survey and, in April 1883, A.W. Ponton, Dominion Land Surveyor, was instructed to go to Fort Ellice to mark off, among other projects within Treaty 4 territory, the land surrendered by Waywayseecappo and the reserve to be set apart for the Gambler. For those two particular surveys, Ponton was to be "guided by the advice and instructions of Mr. Agent Herchmer."[88]

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[83] Surrender No. 163, March 7, 1881 (ICC Documents, pp. 258, 260-61).

[84] Order in Council PC 654, April 27, 1881, NA, RG 2, series 1, vol. 209, pt. 2 (ICC Documents, p. 262).

[85] John C. Nelson, Dominion Land Surveyor, to Superintendent General of Indian Affairs, December 29, 1882, Canada, Parliament, *Sessional Papers*, 1883, No. 5, "Report of the Department of Indian Affairs for the Year Ended 31st December, 1882," p. 214.

[86] A. Russell, for the Surveyor General, to L. Vankoughnet, Deputy Superintendent General of Indian Affairs, December 14, 1882, NA, RG 10, vol. 6654, file 106A-3 (ICC Documents, p. 338); John R. Hall, Secretary, Department of the Interior, to L. Vankoughnet, Deputy Superintendent General of Indian Affairs, February 13, 1883, NA, RG 10, vol. 6654, file 106A-3 (ICC Documents, pp. 312-15).

[87] John R. Hall, Secretary, Department of the Interior, to L. Vankoughnet, Deputy Superintendent General of Indian Affairs, February 13, 1883, NA, RG 10, vol. 6654, file 106A-3 (ICC Documents, p. 313); Edgar Dewdney, Indian Commissioner, to Superintendent General of Indian Affairs, Ottawa, February 24, 1883, NA, RG 10, vol. 6654, file 106A-3 (ICC Documents, pp. 343-45).

Ponton provided two reports of events related to the survey of the reserves at Bird Tail Creek and Silver Creek in the summer of 1883, one immediately after the survey and the other in his annual report. According to these reports, Ponton and Herchmer both went to the Bird Tail Creek reserve and met members of the Band. In the first report, Ponton described them as "the greater portion of the male population of the Reserve,"[89] whereas in the second report, he says that they "interviewed the Chief, his head men, and several others of the Band."[90] The Chief and his followers believed that they had surrendered more land east of the Bird Tail Creek than was calculated in Dumais's survey. After hearing the Band's concerns, Ponton spent a difficult week resurveying the "tortuous" creek, impeded by high water and thick willows, "with no better result than further disclosing the intractable mood of the Band, and reproducing the oft reiterated, and indefinite statement 'there is not all the land left we are entitled to.'"[91] Following this first week of work, Ponton reported:

> The Indians then met me to decide what sections they would surrender, but they were dissatisfied, claiming that the Reserve should have originally been twelve miles long and six miles wide and contain seventy two square miles, that thirty square miles then being deducted for the Gamblers band they would have forty two square miles left. The Reserve however being only eleven and one half miles long they were left only thirty-nine square miles. . . .[92]

Because the Indians at this point refused to identify the lands to be cut off their reserve until this matter could be settled, Ponton sent part of his crew under his assistant, Mr Haslet, to begin the survey of the Gambler's reserve, while Ponton and his remaining men went to the Oak River Sioux Reserve to settle a boundary dispute. Haslet established the south and east boundaries of the Gambler's reserve, but was forced to await Ponton's return on June 10 to verify the north boundary, since Herchmer had not provided any instructions on this matter. After going to Birtle to obtain a list of sections from the Dominion Lands Office, Ponton returned and completed the survey of the Gambler's reserve.[93] According to Order in Council PC 1151 dated May 17, 1889, which confirmed a large number of reserves in Manitoba and the North-West Territories, Ponton surveyed IR 63, containing 30 square miles on the east side of the Assiniboine River at Silver Creek about nine miles north of Fort Ellice, in June 1883 for 44 families under the Gambler.[94]

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[88] John C. Nelson, Dominion Land Surveyor, to A.W. Ponton, Dominion Land Surveyor, April 1, 1883 (ICC Documents, p. 348).

[89] A.W. Ponton, Dominion Land Surveyor, to Edgar Dewdney, Indian Commissioner, July 13, 1883, NA, RG 10, vol. 7770, file 27117-3, mfm reel C-12056 (ICC Documents, p. 357).

[90] A.W. Ponton, Dominion Land Surveyor, to John C. Nelson, Dominion Land Surveyor, February 25, 1884 (ICC Documents, p. 369).

[91] A.W. Ponton, Dominion Land Surveyor, to John C. Nelson, Dominion Land Surveyor, February 25, 1884, NA, RG 10, vol. 3680, file 12249, mfm reel C-10119 (ICC Documents, p. 369).

[92] A.W. Ponton, Dominion Land Surveyor, to Edgar Dewdney, Indian Commissioner, July 13, 1883, NA, RG 10, vol. 7770, file 27117-3, mfm reel C-12056 (ICC Documents, p. 358).

Upon Ponton's completion of the Gambler's survey, Herchmer told him that the Waywayseecappo Band "had decided to give up the southern portion of their reserve."[95] Ponton completed the survey at Waywayseecappo in July 1883, taking the land east of Bird Tail Creek and 18 sections from the north part of the reserve, as specified in the 1881 surrender, and the remainder of the land to total 30 square miles from the southern portion of the reserve.[96] According to Order in Council PC 1151, the reserve, renamed Lizard Point IR 62, contained 39 square miles on Bird Tail Creek about 15 miles northeast of Birtle, and was surveyed for 26 families under Waywayseecappo.[97] Ponton described the revised reserve in these terms:

> The soil throughout the reserve is generally a black loam, of first-class quality. In the southern and western portions there are numerous ponds, lakes and hay meadows. There is a sufficiency of firewood everywhere in this reserve. Timber fit for building purposes occurs in small quantities throughout, and in larger quantities in the neighborhood of its northern boundary. There is a large lake with partially wooded shores near the centre of the reserve. Its area is about two square miles, and it is said to contain fish. Wild ducks abound.[98]

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[93] A.W. Ponton, Dominion Land Surveyor, to John C. Nelson, Dominion Land Surveyor, February 25, 1884, NA, RG 10, vol. 3680, file 12249, mfm reel C-10119 (ICC Documents, pp. 369-70).

[94] Order in Council PC 1151, May 17, 1889, NA, RG 2, series 1 (ICC Exhibit 12, vol. 3, tab 26, pp. 12-13).

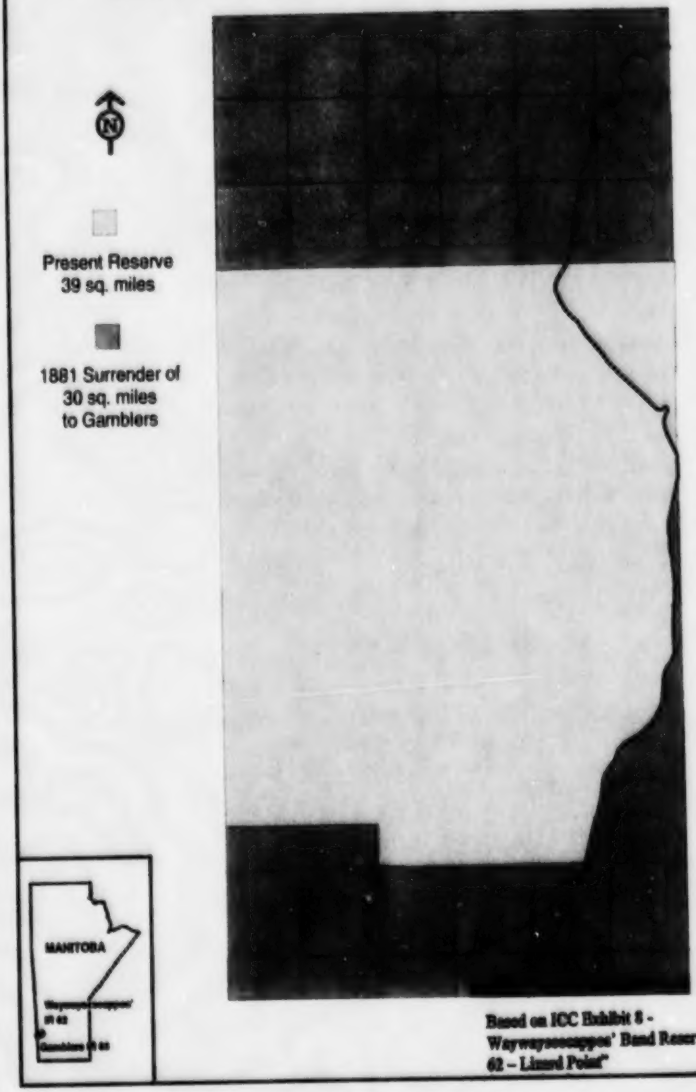
[95] A.W. Ponton, Dominion Land Surveyor, to Edgar Dewdney, Indian Commissioner, July 13, 1883 (ICC Documents, pp. 358-59).

[96] "Waywayseecappo's Band Reserve No. 62 – Lizard Point" (ICC Exhibit 8); "Treaty No. 2, Way-way-see-capo's Band, Lizard Point, No. 62," Plan of Survey, Indian Affairs Survey Records No. 47 (ICC Documents, p. 373).

[97] Order in Council PC 1151, May 17, 1889, NA, RG 2, series 1 (ICC Exhibit 12, vol. 3, tab 26, pp. 10-11).

[98] A.W. Ponton, Dominion Land Surveyor, "Indian Reserve No. 62," NA, RG 2, series 1, vol. 419/DIAND file 501/30-1-33-1, vol. 1 (ICC Documents, pp. 352-53).

Waywayseecappos' Band Reserve No.62 - Lizard Point


N
Present Reserve
39 sq. miles
1881 Surrender of
30 sq. miles
to Gamblers
MANITOBA

Based on ICC Exhibit 8 - Waywayseecappos' Band Reserve No. 62 – Lizard Point"

Hayter Reed, at that time the Acting Assistant Indian Commissioner, observed that

> the part cut off by him [Ponton] differs slightly in shape from that cut off by M. Dumais, & I am of the opinion that Mr. Ponton's survey is the more desirable of the two as he followed the Section lines & legal subdivision boundaries, unless indeed the White Settlers have been permitted to enter the south parts of Sections 16, 17, & 18, T[ownshi]p 19, R[ange] 25 from which it appears by the sketch that M. Dumais cut a narrow strip.[99]

THE GAMBLER'S DISCONTENT WITH THE SILVER CREEK RESERVE

Neither of Ponton's two reports referring to the survey of the reserve at Silver Creek mentions any consultation with the Gambler or band members about the specific location of the reserve or the presence of any band members during the actual survey. His final report does give his opinion of the advantages in the site:

> 'The Gambler's Reserve.' Its alluvial soil of very best quality, its rolling and open aspect, the facilities for continuous ploughing in all directions, *the quantity and quality of its timber in the valley of the Silver Creek* which almost evenly intersects the Reserve, and possesses good water power, gives it advantages over any other reserve visited by me. The men are part of 'Way-way-see-capas', and in their characteristics very similar to the men of that Band. At the time of my visit, only a small portion of the Reserve was under cultivation, but land was under [process]of breaking up, and I doubt not that ere long good accounts will be rendered of this Reserve.[100]

It should be noted that, in relation to the availability of timber on the reserve, Ponton's report is inconsistent with the official description of the reserve filed with the plan for IR 63:

> The reserve generally is high-rolling prairie, interspersed with poplar bluffs of small sized timber from two to four inches in diameter. The soil is a black loam with gravelly ridges, and, with the exception of the valley of Silver Creek, can be almost all cultivated. It is much cut up by the valley of the Silver Creek and lateral coulées running into it. The best land is found on the northern part a short distance from the Manitoba and North-Western Railway. *Some useful poplar timber is still found in*

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[99] Hayter Reed, Acting Assistant Indian Commissioner, to Superintendent General of Indian Affairs, April 14, 1884, NA, RG 10, vol. 6654, file 106A-3 (ICC Documents, p. 377).

[100] A.W. Ponton, Dominion Land Surveyor, to J.C. Nelson, Dominion Land Surveyor, February 25, 1884, NA, RG 10, vol. 3679, file 12249 (reproduced in part at ICC Documents, p. 371). Emphasis added.

> *the valley of Silver Creek, but most of it has been killed by fires*. On the slope to the Assiniboine scattered scrub oak was observed, useful in the manufacture of small implements. *The timber supply is hardly sufficient for the Indians*.[101]

In his September 1884 report, T.P. Wadsworth, the agency and farm inspector for the Department of Indian Affairs, described in some detail the well-furnished houses and the 60 acres of cleared and cropped land of two members of the band, O-gah-mah and Thomas Tanner. He stated that six band members were actively planting crops and raising livestock and were doing very well at both, while other Indians had earned "a good deal of money" working on the railway. From Wadsworth's perspective, "this part of Waywayseecappo's Band, which was allowed to break away from the band and settle here in 1880, has done exceedingly well, and is living in comfort."[102]

However, Wadsworth also indicated that the band was not entirely happy with the reserve. It complained "that the present area is not sufficient nor in compliance with the terms of the treaty" and, despite Ponton's favourable estimation of the quantity and quality of timber on the reserve, that there was not enough wood on the reserve as surveyed.[103] The band asked for the reserve to be extended to the west side of the Assiniboine River where there was "plenty of timber" and "as yet . . . no settlers upon the land asked for."[104] Similarly, in 1886, Acting Indian Agent J.A. Markle reported complaints that the reserve was deficient in both wood and hay land, and he considered various solutions including surrendering land for exchange, granting the band a woodlot, or uniting Waywayseecappo, the Gambler, and South Quill on one reserve:

> I informed them that [it] was my opinion the Department would object to enlarge the Reserve, but if they would agree to surrender an equal quantity of land for hay and wood land, that the Department would grant their request if possible. This they agreed

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[101] A.W. Ponton, Dominion Land Surveyor, "Indian Reserve No. 63," NA, RG 2, series 1, vol. 419 / DIAND file 501/30-1-33-1, vol. 1 (ICC Documents, p. 355). Emphasis added.

[102] T.P. Wadsworth, Inspector, Indian Agencies and Farms, to Superintendent General of Indian Affairs, September 17, 1884, Canada, Parliament, *Sessional Papers*, 1885, No. 3, "Annual Report of the Department of Indian Affairs for the Year ended 31st December, 1884," 91-92 (ICC Documents, pp. 384-85).

[103] T.P. Wadsworth, Inspector, Indian Agencies and Farms, to Superintendent General of Indian Affairs, September 17, 1884, Canada, Parliament, *Sessional Papers*, 1885, No. 3, "Annual Report of the Department of Indian Affairs for the Year ended 31st December, 1884," 91-92 (ICC Documents, p. 385).

[104] T.P. Wadsworth, Inspector, Indian Agencies and Farms, to Superintendent General of Indian Affairs, September 17, 1884, Canada, Parliament, *Sessional Papers*, 1885, No. 3, "Annual Report of the Department of Indian Affairs for the Year ended 31st December, 1884," 91-92 (ICC Documents, p. 385).

> to do, and Gambler, who claims to be the Chief, was to advise me of the sections that would suit them.
>
> He called at my office some time after, and stated that sections 15 and 22, T[ownshi]p 18 R[ange] 29 W[est] of the Assiniboine River suited them. I remember charging Gambler, at the time, to be positive, as the Department might have considerable trouble in acquiring this land, and if they did, that no more changes would be expected. His reply was to this effect. If we get this, we have wood, hay, farm, and pasture land, and will ask no more.
>
> In reply to your inquiry as to the advisability of granting them a wood lot up the River, I beg to offer a few suggestions, which, in my opinion, will bear consideration before further trouble and expense is incurred in acquiring more land for them. An attempt should be made to get a union of Gambler's, Way-way-see-cappo's and South Quill bands, and which I believe can be . . . accomplished. The cost to the Department, in my opinion, of maintaining these three bands on separate Reserves, is too great, and from which they are not deriving the same benefit as they would if a union could be consummated. Education is claimed to be the key to Indian civilization, yet neither [sic] of these three bands have a school. The cost of maintaining three schools, when one would be of more benefit, as it would, in all probability, receive encouragement, and good attendance, will, in time, be considerable expense, and, if to be judged by the one we started at Gambler's, something over a year ago, will be very little encouragement to the Department. More direct supervision could also be given them, and many other advantages, which at present they cannot get without an enormous expenditure of money.[105]

It is perhaps an indication of Markle's inexperience and unfamiliarity with the recent split between the Gambler and Waywayseecappo that his recommendation regarding reuniting the bands was rejected out of hand in a marginal note as "impracticable," although merging Waywayseecappo and South Quill was considered a possibility.[106]

There is no response on file to the first complaint. By the summer of 1887, Markle reported that the Gambler and many of his followers had moved back to the reserve at Bird Tail Creek:

> Gambler, the nominal chief, has now removed to Way-way-see-Cappo's Reserve at Lizard Point, stating, as his reason for the change, that wood and hay are more easily obtained there, and that he will be much nearer to the hunting ground on the Riding Mountain.

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[105] J.A. Markle, Acting Indian Agent, to Indian Commissioner, February 6, 1886, NA, RG 10, vol. 6654, file 106A-3 (ICC Documents, pp. 392-94).

[106] Marginal note in J.A. Markle, Acting Indian Agent, to Indian Commissioner, February 6, 1886, NA, RG 10, vol. 6654, file 106A-3 (ICC Documents, p. 393).

> Long Claws and his relations have also followed Gambler to the Lizard Point Reserve, and I would not be surprised if other members of this band would eventually return to the old reserve for the reasons given by Gambler.[107]"

By the time the Gambler's reserve at Silver Creek was confirmed by Order in Council in 1889, most of its residents with the exception of the Tanner family had rejoined Waywayseecappo. The situation created problems, not only at Lizard Point which had been reoccupied by former residents who had renounced it, but also for followers of Rattlesnake at Valley River who had no desire to move to Silver Creek but had no reserve land to call their own. Hayter Reed, by then the Indian Commissioner, wrote:

> I have the honor to refer to Department's letter of 21 March 1888 and other correspondence relative to the reserve set apart at Silver Creek to enable the Gambler and his band to separate from that of Way-way-see-cappo at Lizard Point.
>
> As the Department is aware, subsequently to the making of such arrangements, Gambler and Long Claws, with their immediate respective followers, returned to Lizard Point.
>
> Out of the number of souls thus left interested in the Silver Creek reserve, viz., 128, there is a considerable proportion who although allowed for when that reserve was surveyed, were at the time residing at Valley River, in what I understand is now blocked out as T[owshi]p 25, R[ange] 23, W1, and had been settled there continuously for some thirty years previously.
>
> The scarcity of wood and hay, which drove Gambler and Long Claws back to Lizard Point, caused a number of those who remained at Silver Creek to abandon it and join those who, as already stated, were settled at Valley River.
>
> The consequence is, that there are now only some 50 souls remaining at Silver Creek, composed almost entirely of members of the Tanner brothers' families, who have made themselves so comfortable, that they would not care to move, and naturally, rather than see the reserve curtailed, would like to force the others to return. The Valley River Indians would strongly oppose any attempt to compel them to remove to Silver Creek, nor would it be wise to make it, since their present surroundings, including comparatively good hunting, enable them to live, without assistance from the Government, and undoubtedly, were a meeting of the whole band held, the majority would decide against Silver Creek.
>
> They express a strong desire to have a reserve set apart for them at Valley River, and are quite willing to resign their interest in the Silver Creek reserve, in exchange.
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> The land which could thus be cut off the Silver Creek reserve, although not so well adapted for the Indians, as that at Valley River, is none the less pleasing to the eye, well adapted for white settlers, and could consequently be readily disposed of by the

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[107] J.A. Markle, Indian Agent, Birtle, Manitoba, to Superintendent General of Indian Affairs, Ottawa, July 12, 1887, Canada, Parliament, *Sessional Papers*, 1888, No. 15, "Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1887," 75-77 (ICC Exhibit 12, vol. 4, tab 53).

> Department of the Interior. Everything considered, I feel disposed to strongly recommend that the Indians settled at Valley River have a reserve given them there, on the terms of an exchange, and that provision be made for the possibility of a few more eventually desiring to join them there.[108]

As we have already noted, within five years Rattlesnake's reserve had been created, with 15 square miles of the reserve at Silver Creek being surrendered in exchange for an equal area at Valley River.[109] Similarly, difficulties in setting apart a reserve for South Quill at Rolling River had been overcome and that reserve, too, was created. In 1898, most of the remaining half of the Gambler's reserve at Silver Creek was surrendered for sale, with the exception of small portions of it being used by the Indians remaining in the vicinity.[110] Today, the reserve comprises just 1037 acres in five separate holdings.[111]

Elder James Tanner provided the following testimony in relation to the surrender of 15 square miles to establish a reserve at Valley River:

> Since the time our land – since that time our land has disappeared acre by acre. And at one shot, 15 sections went to Valley River. That 15 sections of land went to Valley River people and got the land, and only Valley River people voted.
>
> . . .
>
> So with 15 sections gone to Valley River, the 15 sections were sold, was sold to farmers and to homesteaders, and all years, and all the years that passed, nobody ever told – talked to us about how our land went from 30 sections to what we have today. In the remaining few acres, that was always missing; we did not know, because nobody ever brought this in front of us to know.[112]

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[108] Hayter Reed, Indian Commissioner, to Deputy Superintendent General of Indian Affairs, December 11, 1889, NA, RG 10, vol. 6654, file 106A-3-1-1 (ICC Exhibit 12, vol. 2, tab 10).

[109] According to one source, the area set apart at Valley River in 1896 was 11,544.46 acres, or just in excess of 18 square miles, to replace the 15 square miles of the Gambler's reserve surrendered in 1893. Foy Poulin, Memorandum to File, "History – Gambler Reserve No. 63," May 11, 1966 (ICC Documents, p. 417).

[110] Memorandum, [author unknown], "In Charge of Records," Department of Indian Affairs, January 26, 1924, NA, RG 10, vol. 3754, file 30848/DIAND file 501/30-33 (ICC Documents, p. 406); see also "Gamblers [sic] Indian Reserve No. 63" (ICC Exhibit 9). The areas not surrendered for sale in 1898 are variously described as totalling 700 acres (Foy Poulin, Memorandum to File, "History – Gambler Reserve No. 63," May 11, 1966 (ICC Documents, p. 409)); 860 acres (Author unknown, [Office of Native Claims], Memorandum to File, "Waywayseecappo Band," February 14, 1979 (ICC Documents, p. 497)); and 1037 acres ("Gamblers [sic] Indian Reserve No. 63" (ICC Exhibit 9)). With regard to the area of 1037 acres represented in Exhibit 9 as being the current size of IR 63, there are two parcels, which would appear to comprise roughly 160 acres, that apparently were not sold following surrender and were returned to the Band in 1963. Deducting 160 acres from 1037 acres would leave an unsurrendered area of approximately 877 acres as of 1898.

[111] "Gamblers Indian Reserve No. 63" (ICC Exhibit 9).

[112] ICC Transcript, November 5 1996, p. 27 (James Tanner).

Mr Patrick Tanner made similar statements to the Commission raising questions about the propriety of this surrender and others involving Gamblers reserve land.[113] Although these are important allegations that warrant close examination to determine if the Crown discharged its lawful obligations towards the Gamblers First Nation in relation to the manner in which these surrenders were taken, our inquiry is limited to considering whether the First Nation has an outstanding treaty land entitlement. Therefore, it should be repeated that the Commission makes no conclusions regarding the validity of the various land surrenders involving the Silver Creek Reserve.

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[113] For example, Mr Patrick Tanner stated that "[a]ll the other Bands that were part of the Fort Ellice amalgamation, there was Wayway, South Quill, Sakimay, Rattlesnake and Gambler, all the other reserves received good sized reserves. They have all – they have all reaped most of the benefit. Gambler lost most of it. Like we have, today, is only maybe one-twentieth of what the reserve was. . . . I guess the one that sticks out the most in my mind was Valley River. They surrendered 15 square miles of Gambler's for their reserve at Valley River. That's the Rattlesnake's. And when they surrendered, I don't know why they were the ones to surrender, but they surrendered part of our reserve, 15 square miles, for their reserve. And at this time when it was surrendered, there was not one person from Gambler who signed the surrender. It seems like whoever asked first got a piece of the pie first, and by the time it came to Gambler's turn, the pie was finished" (ICC Transcript, November 5, 1966, pp. 12-13 [Patrick Tanner]).

PART III

ISSUES

As discussed above, legal counsel for the Gamblers First Nation and Canada agreed at the Planning Conference of June 14, 1996, that the Commission should focus on the following three issues:

1 Was Canada's obligation to provide treaty lands to the claimant in respect of the adherence to Treaty 4 on September 21, 1874, satisfied in 1877 with the selection and survey of the lands at Bird Tail Creek for the "Fort Ellice Band"?

2 To what extent, if at all, did the "surrender for exchange" in 1881 affect the treaty land entitlement of the claimant?

3 What is the quantum of the claimant's outstanding treaty land entitlement, if any?

At the same planning conference, Canada and the First Nation agreed that the apparent discrepancy of some two square miles between the 1881 surrender and the Order in Council accepting that surrender would not be an issue in this inquiry.

Because the First Nation's confirming research on the treaty paylist analysis and determination of the land quantum was not completed, the parties subsequently agreed that the Commission's findings and recommendations in this inquiry should be restricted to identifying the proper date of first survey for the Gamblers First Nation and determining what impact, if any, the 1881 "surrender for exchange" has on the calculation of the First Nation's treaty land entitlement. Part IV of this report sets out our analysis and findings with regard to these two modified issues as agreed to by the parties:

1 Is the proper date of first survey for the Gamblers First Nation 1877 or 1883?

2 To what extent, if at all, did the "surrender for exchange" in 1881 affect the treaty land entitlement of the claimants?

PART IV

ANALYSIS

ISSUE 1 DATE OF FIRST SURVEY

Is the proper date of first survey for the Gamblers First Nation 1877 or 1883?

Canada and the Gamblers First Nation agree that, in addressing the issue of whether Canada's obligation to provide treaty lands to the First Nation has been satisfied, the date of first survey should be used for the purpose of calculating the First Nation's treaty land entitlement. The source of the dispute in this claim is whether the date of first survey was 1877, when William Wagner surveyed the original reserve at Bird Tail Creek for the Fort Ellice Band, or 1883, when a separate reserve was surveyed for the Gambler and his followers at Silver Creek. Selecting one date over the other will have significant consequences in relation to the First Nation's claim. As the case has been framed by the parties, the question of which date is the proper date of first survey for the purposes of treaty land entitlement turns on whether the 1877 survey was performed validly and in accordance with the terms of Treaty 4, since neither party has challenged the legitimacy of the 1881 surrender and the subsequent 1883 survey of reserve land for the Gambler.

The relevant provision of Treaty 4 in this context is the "reserve clause," which provides:

> And Her Majesty the Queen hereby agrees, through the said Commissioners, to assign reserves for said Indians, *such reserves to be selected by officers of Her Majesty's Government of the Dominion of Canada appointed for that purpose, after conference with each band of the Indians*, and to be of sufficient area to allow one square mile for each family of five, or in that proportion for larger or smaller families; provided, however, that it be understood that, if at the time of the selection of any reserves, as aforesaid, there are any settlers within the bounds of the lands reserved

> for any band, Her Majesty retains the right to deal with such settlers as She shall deem just, so as not to diminish the extent of land allotted to the Indians. . . .[114]

In determining the proper date of first survey, we must consider the meaning of the words "after conference with each band of the Indians" and the respective rights and obligations of Canada and the Band in relation to the selection and survey of the Band's reserve lands under Treaty 4. Another area of dispute that arises in the context of this issue is whether the representatives of either Canada or the Band were properly authorized to select the reserve at Bird Tail Creek in 1877. In addressing these questions, we will first set out the main principles of treaty interpretation that have been developed by the courts and applied by the Commission in earlier inquiries, and we will then apply those principles to the facts and treaty provisions in this case.

Principles of Treaty Interpretation

In previous inquiries into claims involving alleged outstanding treaty land entitlements, the Commission has found that, although there is limited case authority dealing with treaty land entitlement, a convenient starting point is the six well-established principles of treaty interpretation that have arisen in the jurisprudence. These principles were concisely restated in the *Report and Recommendations on Treaty Land Entitlement* published by Saskatchewan's Office of the Treaty Commissioner:

> - The treaty should be given a fair, large and liberal construction in favour of the Indians.
> - Treaties must be construed not according to the technical meaning of their words, but in the sense that they would naturally be understood by the Indians.
> - As the honour of the Crown is always involved, no appearance of "sharp dealing" should be sanctioned.
> - Any ambiguity in wording should be interpreted as against the drafters and should not be interpreted to the prejudice of the Indians if another construction is reasonably possible.
> - Evidence by conduct or otherwise as to how the parties understood the treaty is of assistance in giving it content.

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[114] *Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice* (Ottawa: Queen's Printer, 1966), 6. Emphasis added.

> - The treaty was made with Indians, not bands, and an examination of the treaty as a whole indicates that most terms are intended to treat individual Indians equally, and bands in proportion to their populations.[115]

As we stated in our reports into the claims of the Kahkewistahaw and Lucky Man Cree Nations, we take the view that these principles of interpretation, applied in the context of treaty land entitlement, lead to the conclusion that the Commission will normally apply the date of first survey approach to calculate treaty land entitlement unless there are unusual circumstances which would otherwise result in manifest unfairness.[116] We have already noted that this conclusion is not in issue in the present inquiry because the parties, although differing on what constitutes the date of first survey, do not disagree with the date of first survey approach as the basis for calculating the band's entitlement.

Nevertheless, certain of the Commission's earlier conclusions regarding treaty land entitlement bear repeating. As we stated in our report on the treaty land entitlement claim of the Fort McKay First Nation:

> The treaty conferred upon every Indian an entitlement to land exercisable either as a member of a band or individually by taking land in severalty. In the case of Indians who were members of a band, *that entitlement crystallized at the time of the first survey of the reserve*. The quantum of land to which the band was entitled in that first survey is a question of fact, determined on the basis of the actual band membership – including band members who were absent on the date of first survey.[117]

In its report on the Lac La Ronge inquiry, the Commission summarized its findings on the nature and extent of the Crown's obligations by setting out six principles, which provide a useful framework for dealing with treaty land entitlement claims:

> 1 The purpose and intention of the treaty is that each band is entitled to 128 acres of land for each member of the band, and every treaty Indian is entitled to be counted in an entitlement calculation as a member of a band.

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115 Cliff Wright, Office of the Treaty Commissioner, *Report and Recommendations on Treaty Land Entitlement* (Saskatchewan, May 1990), 24.

116 ICC, *Inquiry into the Treaty Land Entitlement Claim of the Kahkewistahaw First Nation* (Ottawa, November 1996), reported (1998) 6 ICCP 21 at 77-78; ICC, *Inquiry into the Treaty Land Entitlement Claim of the Lucky Man Cree Nation* (Ottawa, March 1997), reported (1998) 6 ICCP 109 at 155.

117 ICC, *Inquiry into the Treaty Land Entitlement Claim of the Fort McKay First Nation* (Ottawa, December 1995), reported (1996) 5 ICCP 3 at 53. Emphasis added. It should be noted that, unlike Treaties 8 and 10, Treaty 4 does not allow for land to be provided in severalty. However, in our view, the general principle providing for the quantum of land to be determined at the time of the first survey is identical under each treaty.

> 2 For a band without reserves, the quantum of land entitlement crystallizes no later than the date of the first survey and shall be based on the actual band membership, including band members who were absent at the time of the survey.
>
> 3 If the band received its full land entitlement at date of first survey, Canada's treaty obligations are satisfied, subject to the principle that "late additions" are entitled to be counted for entitlement purposes.
>
> 4 If a band did not receive its full entitlement at the date of first survey, or if a new or additional shortfall arose as a result of "late additions" joining the band after first survey, the band has an outstanding treaty entitlement to the shortfall acreage, and Canada must provide at least this amount of land in order to discharge its obligation to provide reserve lands under treaty.
>
> 5 Canada's failure to provide the full land entitlement at date of first survey, or subsequently to provide sufficient additional land to fulfil any new treaty land entitlement arising by virtue of "late additions" joining the band after first survey, constitutes a breach of the treaty and a corresponding breach of fiduciary obligation. A breach of treaty or fiduciary obligation can give rise to an equitable obligation to provide restitution to the band.
>
> 6 Natural increases or decreases in the band's population after the date of first survey have no bearing on the amount of land owed to the band under the terms of treaty.[118]

In its subsequent report on the Kahkewistahaw First Nation's treaty land entitlement claim, the Commission offered the following views on the date of first survey, based on its comments arising out of the treaty land entitlement inquiry for the Lac La Ronge Indian Band:

> In the Lac La Ronge inquiry, the Commission interpreted the reserve clause in Treaty 6 and considered a number of possible dates and approaches for calculating treaty land entitlement, including the date of treaty, the date of selection, the date of first survey, and the current date. Although the wording of the reserve clause in Treaty 6 (signed in 1876) is not identical to that contained in Treaty 4, the two are substantially similar. Treaty 6 provides that "the Chief Superintendent of Indian Affairs shall depute and send a suitable person to determine and set apart the reserves for each Band, after consulting with the Indians thereof as to the locality which may be found to be most suitable for them."[119] After considering the various options for calculating entitlement, the Commission made the following conclusions about the interpretation of the reserve clause:

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[118] ICC, *Lac La Ronge Indian Band Report on Treaty Land Entitlement* (Ottawa, March 1996), reported (1996) 5 ICCP 235 at 318-19.

[119] For comparative purposes, the wording of the reserve clause in Treaty No. 4 is set out on pages 16 and 51 of this report.

> In our view, the wording of the treaty and the surrounding historical context suggest that the parties intended to carry out the selection and survey of reserves within a short time following treaty to avoid conflicts with settlers over land selections. Despite the absence of clear wording in the treaty or definitive policy guidelines on treaty land entitlement, the general practice of Indian Affairs was to calculate the amount of land to be set aside by counting the number of band members on the most recent treaty annuity paylist available to the field surveyor at the time of the survey. If the parties had intended to use the populations of Indian bands at the time of the treaty to determine land entitlement, this could have been easily accomplished by attaching a schedule to the treaty listing the respective population figures for each band that signed treaty. The fact that Indian Affairs lacked reliable information on band population figures at the time of treaty suggests that such an interpretation was not intended by the parties. . . .
>
> In our view, the most reasonable interpretation of the reserve clause is that every treaty Indian is entitled to be counted – once – for treaty land entitlement purposes, and that the parties intended to determine the size of Indian reserves by reference to a band's population on or before the date of first survey. This interpretation is supported by the wording of the reserve clause itself, by the statements made by the parties during the treaty negotiations, and by the subsequent conduct of the parties relating to the selection and survey of reserves. We reiterate that this conclusion is consistent with the principles outlined in the Commission's Fort McKay and Kawacatoose Reports. These reports provide that all treaty Indians, including "late additions [such as new adherents to treaty and transferees from landless bands]" are entitled to be counted for entitlement purposes, even if they join a band after its full land entitlement has been set aside.
>
> In general, we agree with the statement in the 1983 [Office of Native Claims Historical Research Guidelines for Treaty Land Entitlement Claims] that, "although the treaties do not clearly identify the date for which a band's population base is to be determined for the land quantum calculations the most reasonable date is not later than the date of first survey of land." Depending on the facts of any given case, it may be necessary to consider many questions in selecting the date on which a band's population should be assessed, including the specific terms of treaty, the circumstances surrounding the selection of land by the band, delays in the survey of treaty land, and the reasons for those delays.[120]

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[120] ICC, *Inquiry into the Treaty Land Entitlement Claim of the Kahkewistahaw First Nation* (Ottawa, November 1996), reported (1998) 6 ICCP 21 at 76-77. The passage referred to from the Commission's report into the treaty land entitlement claim of the Lac La Ronge can be found at ICC, *Inquiry into the Treaty Land Entitlement Claim of the Lac La Ronge Indian Band* (Ottawa, March 1996), reported (1996) 5 ICCP at 235 at 316-17.

As we noted previously, the date of first survey approach is not in issue in these proceedings, but the foregoing passages are useful to establish the context of our analysis.

It is also helpful in this inquiry to refer to the Department of Indian Affairs and Northern Development's "Criteria Used in Determining Bands with Outstanding Entitlements in Saskatchewan" as it relates to cases involving band splits. Although the criteria were developed by Indian Affairs in 1977 expressly in relation to Saskatchewan bands, this document is instructive in identifying how Canada generally dealt with band splits and the calculation of land entitlement under the numbered treaties. The criteria state that once a band has split or divided to form two or more new bands, different methods of calculating treaty land entitlement will be used depending on whether the split occurred before or after the date of first survey. Generally, if the band received treaty land before the split occurred, the band's treaty land entitlement would be calculated based on the population of the original band as a whole as of the date of first survey rather than on the populations of the new bands. Conversely, if treaty land was allocated but not to the original band before the split occurred, then entitlements would be calculated separately for the new bands after the split based on their respective dates of first survey.[121]

In the case at issue, the First Nation challenges Canada's contention that the first survey occurred before the Gambler and his followers split from Waywayseecappo. Counsel submits that, although Canada sought to amalgamate on one reserve the followers of as many Chiefs as possible, this policy of amalgamation failed at an early stage because of the nomadic nature of the Indians of that area at that time:

> The phrase "Band" is often used in terms of the notes by Lieutenant Governor Morris at that time. Tents, tribes, those kind of phrases are tossed about. There are, in the materials provided to the Commissioners, several socio-economic historical reports, and they all seem to suggest that particularly in the Fort Ellice region, the Saulteaux, and the Qu'Appelle region, the Crees, at that time were very migratory. The concept of a Chief was something that was basically an indication that the majority had supported somebody, or for the time being support somebody, and that person carried the mantle of chieftainship at that time. It could change almost any time.[122]

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[121] Department of Indian Affairs and Northern Development, "Criteria Used in Determining Bands with Outstanding Entitlements in Saskatchewan," August 1977.

[122] ICC Transcript, November 6, 1996, p. 93 (Paul B. Forsyth).

Canada submits that, unlike Sakimay, who received a separate reserve as early as 1876, the Gambler did not ask to be treated separately; he remained a headman under Waywayseecappo until the surrender in 1881 and should be treated as one of the people represented by Waywayseecappo.[123] For its part, the First Nation contends that, when the Gambler objected to Wagner's survey in 1877, he did so on behalf of his own followers as well as Waywayseecappo and his people, for whom the Gambler had been appointed spokesman.[124] However, the First Nation did not go so far as to suggest that the Gambler and his people comprised a separate band in 1877. It also did not suggest that, if Wagner had amended his survey to suit the Gambler at that time, the land so set apart would not have formed the reserve for Waywayseecappo, the Gambler, and their combined followers, or that the survey would not have been their "first survey."

In its inquiry into the claim of the Young Chipeewayan Band regarding Stoney Knoll IR 107, the Commission was called upon to determine whether the claimants constituted a "band." We noted the definition of a "band" in the 1876 ***Indian Act*** as "any tribe, band or body of Indians who own or are interested in a reserve or in Indian lands in common of which the legal title is vested in the Crown, or who share alike in the distribution of any annuities or interest moneys for which the Government of Canada is responsible."[125] We found that, "[i]n common parlance the words 'band,' 'tribe,' and 'body' all imply a group living as a community, a communal group"[126] and that "a 'band,' as that term is used in common law, is a body of individuals who exist as a collective, cohesive, and identifiable community."[127] The evidence before the Commission in that case led us to conclude that the claimants were "an identifiable community living today, or indeed at any time previous, as a collectivity."[128]

In the present case, if we were required to decide whether Waywayseecappo, the Gambler, and their followers constituted a band in 1877, we would be inclined to conclude that, following the survey by Wagner, they were indeed a body of Indians living together as a collective community on the reserve set aside for them. At the 1881 surrender meeting, the Gambler sought Waywayseecappo's consent to surrender land in exchange for land that Gambler and his followers would receive at Silver Creek – a consent that presumably would not have been required had the Gambler and his people previously constituted a separate band. In the Gambler's own surrender speech, he confirmed that he had gathered members to join the band of which Waywayseecappo was to be "our Chief."

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[123] ICC Transcript, November 6, 1996, pp. 206-07 (François Daigle).

[124] ICC Transcript, November 6, 1996, p. 208 (Paul B. Forsyth).

[125] *Indian Act*, SC 1876, c. 18, s. 3(1).

[126] ICC, *The Young Chipeewayan Inquiry into the Claim regarding Stoney Knoll Indian Reserve No. 107* (Ottawa, December 1994), reported (1995) 3 ICCP 175 at 198.

[127] ICC, *The Young Chipeewayan Inquiry into the Claim regarding Stoney Knoll Indian Reserve No. 107* (Ottawa, December 1994), reported (1995) 3 ICCP 175 at 202.

[128] ICC, *The Young Chipeewayan Inquiry into the Claim regarding Stoney Knoll Indian Reserve No. 107* (Ottawa, December 1994), reported (1995) 3 ICCP 175 at 202.

However, we do not find it necessary to determine whether Waywayseecappo, the Gambler, and their followers comprised a single band because it has not been raised as an issue. The First Nation is merely challenging the validity of the 1877 survey; it is not claiming that the Gambler led a separate band. That being the case, since the First Nation merely contends that the 1877 survey by Wagner *prior* to the band split in 1881 was invalid, it follows, in the First Nation's submission, that the true first surveys were performed by Ponton *after* the band split and that entitlements should be calculated accordingly. Canada takes the opposite position.

We will now consider the validity of the 1877 survey.

"Conference with Each Band of the Indians"

The validity of the 1877 survey by William Wagner must be measured with reference to the requirements of Treaty 4 regarding the establishment of reserves for the Indian peoples of that territory. For ease of reference, it will be recalled that the reserve clause states:

> And Her Majesty the Queen hereby agrees, through the said Commissioners, to assign reserves for said Indians, ***such reserves to be selected by officers of Her Majesty's Government of the Dominion of Canada appointed for that purpose, after conference with each band of the Indians***, and to be of sufficient area to allow one square mile for each family of five, or in that proportion for larger or smaller families; provided, however, that it be understood that, if at the time of the selection of any reserves, as aforesaid, there are any settlers within the bounds of the lands reserved for any band, Her Majesty retains the right to deal with such settlers as She shall deem just, so as not to diminish the extent of land allotted to the Indians; and provided, further, that the aforesaid reserves of land, or any part thereof, or any interest or right therein, or appurtenant thereto, may be sold, leased or otherwise disposed of by the said Government for the use and benefit of the said Indians, with the consent of the Indians entitled thereto first had and obtained, but in no wise shall the said Indians,

> or any of them, be entitled to sell or otherwise alienate any of the lands allotted to them as reserves.[129]

We will consider first the meaning and application of the conference requirement in this clause before turning to the question of who constituted the authorized representatives for both Canada and the Band in the land selection process.

The Meaning of "Conference"

Canada and the Gamblers First Nation agree that, under the terms of Treaty 4, the Crown's representatives were required to confer with a particular band of Indians before setting apart a reserve for that band. Where they differ is on the content of the conference requirement and which party – Canada or the band, or either of them – has the final say in determining the location of the band's reserve.

Canada urges the Commission to find that the word "conference" within the overall context of the reserve clause means that, after conferring with a band regarding the desired location for its reserve, Canada's officers were to select reserve land for the band. Counsel contends that this definition is true regardless of whether the Commission relies simply on the "clear terms" of the treaty or, should it find those terms ambiguous, on additional extraneous evidence. Similarly, it would be contrary to the terms of treaty to suggest that a band has the exclusive right to ***determine*** the location of its reserve or the right to at least ***consent*** to the location before the reserve is set apart.[130] Canada argues that, if the treaty makers had intended that the Indians should have to consent or agree to the locations of their reserves, the treaty makers would have used the word "consent" just as they did in the proviso of the reserve clause that allows the government to dispose of reserve lands "with the consent of the Indians entitled thereto first had and obtained":

> If you go to the word "consent" or "agreement," it implies a decision; it implies "yes" or "no"; it implies a free exercise of will.
>
> "Conference" and "consent" are different words. They mean different things and they mean different things in their ordinary meaning, . . . the ordinary meaning of both parties to the Treaty, I submit.[131]

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[129] *Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice* (Ottawa: Queen's Printer, 1966), 6. Emphasis added.

[130] Submissions on Behalf of the Government of Canada, October 29, 1996, p. 12.

[131] ICC Transcript, November 6, 1996, p. 169 (François Daigle).

In any event, Canada argues that the source of the power to set aside reserves is not the treaty but rather the royal prerogative of the Crown:

> The assumption here is that the power to set aside reserves derives from the Treaty. The power to set aside reserves does not derive from the Treaty, we submit; it's an exercise of the Royal prerogative of the Crown. There is an obligation on the Crown to set aside reserves, but the actual setting aside is done through the Royal prerogative of the Crown.[132]

Counsel submits that the selection of reserves by Canada's representatives is subject to certain matters that Canada must consider in making the selection, including:

- the wishes of the band;[133]
- the rights of settlers already resident on the land selected;[134]
- existing township surveys and further requirements of the *Dominion Lands Act* regarding lands for schools and the Hudson's Bay Company;[135] and
- other factors such as the shape of the reserve, water frontage, soil quality, access to timber, existing and future settlements, railway use, and suitability for uses such as farming and hunting.[136]

According to Canada, "[t]he fact that the Crown's discretion is limited in the selection of reserves also supports the view . . . that the discretion was the Crown's; it wasn't the First Nation's." Therefore, in counsel's submission, Canada rather than the band has the final say in determining where the band's reserve should be located.[137]

The Gamblers First Nation responds that Canada's interpretation of the word "conference" is too narrow. Rather than mere consultation, "conference" in a legal setting implies meeting and consulting to resolve differences, to harmonize conflicting views and ultimately to arrange a compromise acceptable to both parties.[138] The First Nation agreed that "consent" means something different than "conference," but it expressed the difference in this way:

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[132] ICC Transcript, November 6, 1996, p. 171 (François Daigle).

[133] ICC Transcript, November 6, 1996, p. 185 (François Daigle).

[134] ICC Transcript, November 6, 1996, p. 173 (François Daigle); Submissions on Behalf of the Government of Canada, October 29, 1996, p. 13.

[135] ICC Transcript, November 6, 1996, pp. 173, 181 (François Daigle); Submissions on Behalf of the Government of Canada, October 29, 1996, p. 13.

[136] ICC Transcript, November 6, 1996, pp. 179-80 (François Daigle); Submissions on Behalf of the Government of Canada, October 29, 1996, p. 13.

[137] ICC Transcript, November 6, 1996, p. 172 (François Daigle).

> "Consent" as used in the second paragraph of the Treaty is basically, Canada comes and says, we're going to dispose of this, we're going to use this, we're going to expropriate this, we need your consent, will you do it. It's a much different concept than I suggest is covered with the words "after conference," which talk about negotiation and compromise and agreement.[139]

Counsel pointed to a number of indicators that the treaty requires at least agreement between a band and the Crown in the selection of reserve lands, and suggested that these might even go so far as to show that, in the final analysis, a band's wishes should be paramount:

- At the 1874 treaty negotiations, the Gambler is reported by Morris to have said that "we have not looked around us yet, and chosen our land, ***which I understand you tell us to choose***."[140]
- Commissioners Christie and Dickieson were instructed "***to select the Reserves where they shall be deemed most convenient and advantageous for the Indians***, each Reserve to be selected as provided by the Treaty after conference with the Indians interested therein and subject to the other conditions set forth in the Treaty."[141]
- In his memorandum regarding the selection of reserves, Surveyor General J.S. Dennis stated that, "as soon as possible ***after the location of the reserves in question may be decided upon between the Commissioner and the Indians***, the outlines thereof, in each case, should be laid out and marked upon the ground."[142]

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[138] ICC Transcript, November 6, 1996, pp. 137-38 (Paul B. Forsyth).

[139] ICC Transcript, November 6, 1996, p. 210 (Paul B. Forsyth).

[140] Submissions on Behalf of the Gamblers First Nation, October 24, 1996, p. 21; Morris, *Treaties of Canada*, 84-85 (ICC Documents, p. 31).

[141] Submissions on Behalf of the Gamblers First Nation, October 24, 1996, p. 21; Order in Council, July 9, 1875, NA, RG 10, vol. 3622, file 5007 (ICC Documents, p. 46). Emphasis added.

[142] Submissions on Behalf of the Gamblers First Nation, October 24, 1996, p. 23; J.S. Dennis, Surveyor General, Memorandum, July 13, 1875, NA, RG 10, vol. 3622, file 5007 (ICC Documents, pp. 48-49).

- Following the Commissioners' meetings with the Indians in 1875, Christie wrote that "*[t]he Chiefs at [Fort] Ellice were not all decided as to the locality of their Reserves*."[143]
- In his report of those same meetings with the Fort Ellice Band, Wagner commented, first, that "*the Reserve for this tribe was choosen* [sic] *by them* at the head of Bird Tail Creek" and, second, that "[*t*]*he Fort Ellice Indians* numbering 65 families *will probably choose the midst of the woods* and occupy nearly 2 townships of 41600 acres."[144]
- Finally, in response to a request for his legal opinion regarding the requirements for setting apart a reserve upon a claim by a trespasser that a reserve had not been properly created, Z.A. Lash of the Department of Justice stated that, "the survey and setting out of the reserve having been done with the express consent & approval of the Indians & having since been acquiesced in by them, no Order in Council is necessary; but in as much as an Order in Council is a more formal record of the proceedings the undersigned recommends, for the avoidance of doubts, that one be passed approving of & confirming the reserve as already set apart."[145]

In conclusion, the First Nation submits that a liberal interpretation of Treaty 4 means that the Indians would have understood the word "conference" to mean that they were entitled to select their own reserve or that they must at least agree with Canada as to the land to be set apart.[146] Counsel did express one caveat, however:

> It's not our submission that the wishes of the Bands are absolute and paramount and without reasonable restriction.

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[143] Submissions on Behalf of the Gamblers First Nation, October 24, 1996, p. 24; W.J. Christie, Indian Commissioner, to E.A. Meredith, Deputy Minister, Department of the Interior, September 9, 1875, PAM, MG 12, B1, Alexander Morris, Lieutenant Governor's Collection, No. 1094 (ICC Documents, p. 69).

[144] Submissions on Behalf of the Gamblers First Nation, October 24, 1996, p. 24; William Wagner, Dominion Land Surveyor, to Minister of the Interior, January 2, 1876, NA, RG 88, vol. 300, file 0644 (ICC Documents, pp. 105-06).

[145] Submissions on Behalf of the Gamblers First Nation, October 24, 1996, p. 24; Z.A. Lash, Department of Justice, to Department of the Interior, August 12, 1876, NA, RG 10, vol. 3637, file 6853 (ICC Documents, p. 129). Canada responded that, having regard to the context in which it was given, Lash's opinion is merely relevant to the question of whether a reserve exists vis-à-vis a trespasser, not as between Canada and a band, and in the trespass context an Order in Council is not required to signify the existence of a reserve. However, in Canada's view, Lash's opinion does not stand for the proposition that the consent of a band is necessary to establish a reserve.

[146] Submissions on Behalf of the Gamblers First Nation, October 24, 1996, p. 20.

> There are restrictions that are reasonable. If settlers are settled in an area, or a city or town exists, it would not be reasonable, even if the Band said they wanted that land, to uproot all of those settlers. That's considered in the words of the Treaty.
>
> By the same token, things like railways, telegraphs, I mean I think those are reasonable limitations. Some of the things that are referred to in the *Dominion Lands Act* would probably be reasonable limitations.
>
> But subject to reasonable limitations, the wishes of the Bands, the Indians, were to be paramount at that time. And unless there was a reasonable, an objective reason to disallow what the Indians had chosen, particularly at the meeting with Christie, then their wishes should not have been ignored.[147]

The Commission has already had the opportunity in two previous inquiries to consider the requirements for creating a reserve. In the first, which like the present case dealt with a claim under Treaty 4, the Commission was asked by the Kahkewistahaw First Nation to determine whether a band's treaty land entitlement should be calculated when the band requested land in a particular location or when the first survey had been completed. We stated:

> It is clear that a band's *entitlement* to reserve land arises upon the band signing or adhering to treaty. However, the *quantification* and *location* of the band's entitlement are not triggered until certain procedures described in the treaty are carried out. Under Treaty 4, "*such reserves [are] to be selected* by officers of Her Majesty's Government of the Dominion of Canada appointed for that purpose, *after conference with each band of the Indians.*" In our view, the purpose of the "conference" with the band was to ensure that the land to be set aside as reserve met with the approval of the chief and headmen and that it was suitable for its intended purpose (which was typically agriculture in the case of bands in southern Saskatchewan). However, it does not necessarily follow that the band's population on the date of selection should determine the size of the reserve.
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> In theory, the process of setting apart a reserve should have been straightforward. The band would identify the location it wanted for its reserve and would meet with Canada's officers – often the Indian agent or the surveyor or both – to communicate its choice. There would, in that sense, be a "conference" as contemplated by Treaty 4. If Canada agreed with the band's selection, and assuming there were no conflicting claims for the selected lands, steps would be taken to survey the reserve following a calculation of the band's entitlement. Because Indian Affairs did not maintain comprehensive band lists or reliable census data until about 1951, the band's population would be estimated based on the best information available to the surveyor at that time – including paylist figures, discussions with the chief, the Indian agent and others, and the surveyor's own knowledge of the band. In fact, it was not unusual for the surveyor to provide land in excess of the band's paylist population in situations

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[147] ICC Transcript, November 6, 1996, pp. 210-11 (Paul B. Forsyth).

where the government estimated that a substantial number of band members were absent at the time of the survey.

Based on the best information available, the surveyor would determine the band's population, calculate the area of land to be set aside, run survey lines on the ground, establish monuments to identify the area, document the work in field notes, complete a survey plan, and submit the plan to Ottawa for approval and registration. From the perspective of the band, members could accept the reserve set aside by the surveyor, either expressly by stating their approval or implicitly by residing on and using the reserve for their collective benefit. Conversely, the band might express its disapproval by objecting to Canada's officers or simply by refusing to live on or use the reserve as surveyed.

It was only when *agreement* or *consensus* was reached between the parties to the treaty – by Canada agreeing to survey the land selected by the band, and by the band accepting the survey as properly defining the desired reserve – that the land as surveyed could be said to constitute a reserve for the purposes of the treaty. Therefore, the date of first survey was significant because, if the band accepted the surveyed land as its reserve, the completion and acceptance of the first survey provided evidence that both parties agreed that the land would be treated as an Indian reserve for the purposes of the treaty. Since the survey is important evidence of Canada's intention to establish a reserve, it is not unreasonable to use the date on the survey plan as the date of first survey for entitlement calculation, provided that the completion of the physical survey of the reserve boundaries can be shown to have coincided roughly with the preparation of the survey plan. Once it has been concluded that a reserve has been set aside, the population must be assessed on this date to determine whether Canada has satisfied the band's treaty land entitlement.

We are mindful of the six principles of treaty interpretation, which have been defined by the courts and raised by counsel for Kahkewistahaw. We do not agree, however, that those principles drive us inexorably to the conclusions that the First Nation would have us reach. In our view, using the date of first survey as the operative date for calculating treaty land entitlement represents an interpretation that is "fair, large and liberal" and accords with the manner in which the land allocation process would have been understood by the Indians at the time of survey.

We disagree that using the date of first survey rather than the date of selection is "clearly prejudicial to the Indians," or that using the date of selection "would ensure that all Indians receive land and are treated equally, fairly and consistently." It is not accurate to suggest that one approach is universally favourable to the Indians and the other is consistently prejudicial. Calculating a band's population on the date of selection would work to the band's detriment if the band's population was increasing, just as calculating the population on the date of first survey would be disadvantageous if the population was decreasing.

We believe that the Commission's approach is supportable as a fair and reasonable interpretation of Treaty 4. We note in passing that this approach is also consistent with the methodology developed by Canada in the Office of Native Claims Historical Research Guidelines for Treaty Land Entitlement (the 1983 ONC Guidelines), which identify five distinct steps to determine whether a band has received its full land entitlement:

> Determining a Band's treaty land entitlement involves five basic steps:
>
> 1) Identification of the band and the applicable Treaty.
> 2) Determination of the relevant survey date.
> 3) Determination of the total lands received by the band.
> 4) Determination of the population base.
> 5) Overall entitlement calculations.
>
> . . .
>
> B Date for Entitlement Calculation
>
> The date to be used in the land quantum calculations is seldom clearly spelled out in any of the treaties. Some of the treaties refer to the laying aside or assignment of a reserve, others mention the selection of land. Legal advice from the Department of Justice suggests that, although the treaties do not clearly identify the date for which a band's population base is to be determined for the land quantum calculations, *the most reasonable date is not later than the date of first survey of land. It is Canada's general view that this is the date to be used to determine whether it has met its obligation under the treaties, to provide a quantum of land to an Indian Band based on the population of that Band at date of first survey.*
>
> *Generally the date to be used is taken from the plan of survey of the first reserve set aside for the use and benefit of an Indian Band. This is the date which is noted by the surveyor as the date which he carried out the survey. Other indicators that ought to be noted include the date on which the surveyor signed the plan and the date noted in the surveyor's field book.*
>
> *In some cases, the date which is chosen for entitlement purposes is not the date of the first actual survey for a band's reserve. A reserve may have been surveyed for the band, but it was never administered as a reserve. Furthermore, if the band rejects the survey and abandons the reserve after the survey, another reserve may be surveyed elsewhere at a later date and confirmed by Order-in-Council. Depending on the facts in each case, this could be considered as the date of first survey. The later survey could be used as date of first survey because this is when the first reserve, officially recognized by Order-in-Council, was set aside for the band.*[148]

As the last paragraph implies, where more than one survey has been performed for a given band, a critical issue in determining whether a band's treaty land entitlement has been satisfied is to ascertain which survey is the band's *first* survey. According to the OTC's "Research Methodology for Treaty Land Entitlement (TLE)" guidelines, the "first survey" can be identified by:

- determining whether the reserve was surveyed or located in conformance with the terms of the treaty – in this case, following consultation between Canada's officers and the band as required by Treaty 4;

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[148] Department of Indian Affairs and Northern Development, "Office of Native Claims Historical Research Guidelines for Treaty Land Entitlement Claims," May 1983. Emphasis added.

> - determining whether the survey or allotment was acceptable to the band; and
> - determining whether the survey or allotment was accepted by Canada.[149]
>
> A completed survey provides the precise *location* and *size* of a reserve, and is critical in measuring whether a band's treaty land entitlement has been fulfilled. A completed survey does not necessarily confirm, however, that the "first survey" of a band's reserve has *occurred*, particularly where the band rejects the lands as surveyed.
>
> Therefore, we find the most reasonable conclusion to be derived from the interpretation of Treaty 4 is that the date of first survey is the appropriate date for calculating treaty land entitlement. We interpret the Crown's obligation under Treaty 4 to be the allocation of 128 acres of land for each band member at the time that land was *set apart* as a reserve for the use and benefit of the band. It was only when land was *surveyed* by Canada in accordance with the treaty, and *accepted* by the band, that it could be said that the land was properly set apart. Therefore, subject to exceptions being made in unusual circumstances which would otherwise result in manifest unfairness, the general rule is that the population on the date of first survey shall be used to calculate a band's treaty land entitlement.[150]

To summarize, the Commission considers the "conference" requirement of Treaty 4 to be more than a formality. It is included to ensure that the land meets with the approval of band leaders and that it will be suitable for its intended purpose. Once Canada agrees to the band's selection and completes the survey, the band can expressly approve or disapprove of the land set apart; alternatively, it can signal its approval by continuing to reside on and use the reserve for the collective benefit of its members, or its disapproval by refusing to live on and use the reserve as surveyed. In cases involving multiple surveys, it becomes necessary to identify the "true" date of first survey by determining whether a particular reserve was surveyed in accordance with the treaty and was acceptable to both Canada and the band. Obviously, it is a question of fact in each case whether a particular survey should amount to a band's first survey. Indeed, in Kahkewistahaw's case, both Canada and the First Nation agreed that, although first in time, the survey by William Wagner in 1876 was not the true first survey because the band never settled on the land marked out.

After issuing its report in the Kahkewistahaw inquiry, the Commission was called upon to consider similar questions in the treaty land entitlement claim of the Lucky Man Cree Nation. In that case, the First Nation argued that

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[149] Office of the Treaty Commissioner, "Research Methodology for Treaty Land Entitlement (TLE)," 1994.

[150] ICC, *Inquiry into the Treaty Land Entitlement Claim of the Kahkewistahaw First Nation* (Ottawa, November 1996), reported (1998) 6 ICCP 21 at 79-83.

Canada's obligation to set aside a reserve, and to calculate a band's treaty land entitlement, should arise immediately upon the initial consultation taking place. The Commission disagreed, finding that the facts in that case did not establish the necessary consensus at such an early date. After quoting much of the foregoing passage from its Kahkewistahaw report, the Commission considered whether that analysis should apply with equal force in the context of the distinctive terms of Treaty 6. We concluded that it should. Treaty 6 states:

> And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for farming lands, due respect being had to lands at present cultivated by the said Indians, and other reserves for the benefit of the said Indians, to be administered and dealt with for them by Her Majesty's Government of the Dominion of Canada; provided, all such reserves shall not exceed in all one square mile for each family of five, or in that proportion for larger or smaller families, in manner following, that is to say: that the Chief Superintendent of Indian Affairs shall depute and send a suitable person to determine and set apart the reserves for each band, ***after consulting with the Indians thereof as to the locality which may be found to be most suitable for them***.[151]

The Commission stated:

> The contentious words of the reserve clause are contained in the phrase "after consulting with the Indians thereof as to the locality which may be found to be most suitable for them." In our view, the word "consulting" contemplates the initial discussions in which an Indian band informs Canada's agents of its preferred location for a reserve. We agree with Canada's point, however, that other clauses in the treaty give fuller expression to the parties' intention that a band's reserve shall be "***agreed upon*** and surveyed." It is just this sort of consensus or meeting of the minds that the Commission referred to in its report dealing with the Kahkewistahaw Band of Treaty 4, and we believe that this conclusion is equally applicable to bands under Treaty 6.
>
> The Lucky Man Cree Nation argued that the obligation to set aside a reserve arose as soon as "consultation" took place. In fact, we consider that the obligation to set aside a reserve arose even earlier – upon a band's adhesion to treaty. As we stated in the Kahkewistahaw report, however, the ***quantification*** and ***location*** of a band's entitlement were not triggered until the consensus contemplated by the treaty was achieved. As a general rule, the consensus to which we refer would normally occur upon ***completion*** of the survey – that is, at the date of first survey. It is true that there had to be a preliminary understanding of some sort between Canada and a band with respect to a specific location before a survey would even be undertaken. In our view,

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[151] ***Treaty No. 6 between Her Majesty the Queen and the Plain and Wood Cree Indians and Other Tribes of Indians at Fort Carlton, Fort Pitt and Battle River with Adhesions*** (Ottawa: Queen's Printer, 1964), 3.

> this preliminary understanding was not sufficient to constitute the consensus that we contemplate. It was only *following* the survey, when the band indicated its acceptance of the surveyed area as its reserve – either expressly (by saying so) or implicitly (by living on or using the reserve for its benefit) – that a true consensus could have been said to exist. It is for these reasons that the Commission attaches such significance to the date of first survey.[152]

As in this case, Canada argued in the Lucky Man inquiry that the Crown has the final say in determining the location of a band's reserve. The Commission concluded that such a position is inconsistent with the concept of selecting reserves by consensus:

> the Commission does not accept Canada's contention that setting aside reserve land is simply a matter of royal prerogative, and that Canada, rather than a band, is "the decision maker as to both when and where the reserve would be located." Canada was required to "consult" with the Indians by the express terms of Treaty 6. For a true meeting of the minds to take place, both parties must have input into the process, and both must agree on the reserve selected and surveyed.
>
> Arguably, the logical extension of this requirement for consensus is that, just as it would have been open to a band to reject for its own reasons a reserve site selected by Canada, it would have been equally open to Canada to reject sites requested by the band if there were valid reasons for doing so. Canada's discretion in this regard would presumably have to have been exercised reasonably, however. One of the most important – and difficult – roles of government, then and now, is to weigh and reconcile competing interests, and in doing so Canada must have particular regard for treaty rights and the fiduciary nature of its relationship with the Indians. We do not consider this to mean that Canada was immutably bound to prefer the position of the Indians in all cases in which competing policy or other interests arose. What it *does* mean, in our view, is that, if, in the context of setting apart reserves, Canada chose a competing interest over the interests of a particular band, it must have had reasons for doing so that were valid and not coloured by improper considerations.[153]

Neither party in this case has persuaded the Commission that it should take a different approach from the one it took in the Kahkewistahaw and Lucky Man inquiries. We still believe that the treaty makers intended the process of reserve selection to proceed by way of consensus and that, as a result, neither Canada nor the Band could unilaterally determine the location of the reserve. *Both* parties were subject to the reasonable limitations identified in Canada's submissions and conceded by counsel for the First Nation.

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[152] ICC, *Inquiry into the Treaty Land Entitlement Claim of the Lucky Man Cree Nation* (Ottawa, March 1997), reported (1998) 6 ICCP 109 at 162-63.

[153] ICC, *Inquiry into the Treaty Land Entitlement Claim of the Lucky Man Cree Nation* (Ottawa, March 1997), reported (1998) 6 ICCP 109 at 164-65.

We turn now to the question of whether such consensus existed in relation to the 1877 survey.

Was There Consensus?

The submissions by the Gamblers First Nation on this issue are directed towards two main themes. The first is that, in the meeting on August 28, 1875, at which the Gambler was the "chief Orator," Commissioners Christie and Dickieson reached an agreement with the Fort Ellice Band that its reserve should be located "at the head of the Bird Tail Creek," and instructed Wagner to survey the reserve there. Counsel argued:

> Although the specific boundaries are not detailed in the letter it seems apparent that the government representatives knew of the configuration they requested because they knew it fell within the limits of Treaty 2 land.[154]

According to the First Nation, the "only impediment" to surveying the reserve in this location at that time was that the land lay within the geographical limits of Treaty 2 and the Commissioners were unsure whether land could be set apart for a Treaty 4 band there.[155] Presumably, therefore, none of the other "reasonable limitations" on reserve selection identified by counsel for Canada (and conceded by counsel for the First Nation) were relevant factors in this case. Accordingly, the First Nation submits that Canada, and specifically Wagner, knew or ought to have known the Band's wishes before the 1877 survey was undertaken.[156]

The second point of the First Nation's argument is that, once agreement had been reached between the duly authorized representatives of Canada and the Band in 1875 as to the location of the reserve, the government was not permitted to impose a new location unilaterally on the Band. Nevertheless, in a report dated May 9, 1877, Laird commented that, although Band members preferred their reserve on both sides of Bird Tail Creek, they would likely "be content to have it all on the West side." The First Nation views this comment as evidence of Laird's intent to "wrongly and unilaterally depart from the clearly expressed wishes of the Band . . ." and vary without any sound basis the terms of the agreement reached at the 1875 conference. Therefore, the First Nation submits that Laird's conduct amounted to a "flagrant example of a representative of Canada acting 'without honour' in his dealings with those Indians who were looking to Canada to fulfill the spirit and letter of the Treaty."[157]

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[154] Submissions on Behalf of the Gamblers First Nation, October 24, 1996, p. 10.
[155] Submissions on Behalf of the Gamblers First Nation, October 24, 1996, pp. 10, 17-18.
[156] Submissions on Behalf of the Gamblers First Nation, October 24, 1996, p. 2.

Similarly, when Wagner eventually surveyed the reserve in 1877, he did so with the assistance of a man he knew was not the Gambler. He also did so in accordance with that man's instructions and with Laird's recommendation that the reserve be set apart on the west side of Bird Tail Creek – both of which were contrary to the 1875 agreement.[158] The First Nation further submits that, following the survey, the Gambler "immediately" voiced his objection, but Wagner, whether through prejudice,[159] spite,[160] or arrogance,[161] refused to relocate the reserve. In December 1877, Waywayseecappo and his headmen objected once again to no avail, this time to McDonald. According to the First Nation, Wagner's refusal coupled with McDonald's inaction amount to further evidence of Canada's unilateral variation of the selection made in 1875.[162] Counsel argued that the majority of the Band followed the Gambler to his new reserve at Silver Creek and this underscores the level of the Band's disenchantment with Wagner's survey.[163] The logical conclusion of the First Nation's position, submits Canada, is that, if a "conference" requires Canada and a band to reach a consensus, either a consensus was reached in 1875 and then breached by Canada, or no consensus was reached at all.[164] To this argument, the First Nation counters that even Canada did not approve of the 1877 survey:

> To this end, it is significant that the survey of 1877 was never formally approved by the appropriate government authorities, nor was it made the subject of approval by Order-in-Council. On the other hand, the surveys performed in 1883 were approved by Chief Surveyor Nelson in January 1889, and on May 17, 1889 confirmed by Order-in-Council.[165]

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[157] Submissions on Behalf of the Gamblers First Nation, October 24, 1996, pp. 12-13.
[158] Submissions on Behalf of the Gamblers First Nation, October 24, 1996, p. 19.
[159] Submissions on Behalf of the Gamblers First Nation, October 24, 1996, p. 11.
[160] Counsel for the First Nation noted that one of the reasons given by Wagner for refusing to change the reserve location in response to the Gambler's objection was that Wagner considered the Gambler to be "troublesome": Submissions on Behalf of the Gamblers First Nation, October 24, 1996, p. 13.
[161] Submissions on Behalf of the Gamblers First Nation, October 24, 1996, p. 14.
[162] ICC Transcript, November 6, 1996, p. 213 (Paul B. Forsyth).
[163] Submissions on Behalf of the Gamblers First Nation, October 24, 1996, p. 25.
[164] ICC Transcript, November 6, 1996, p. 165 (François Daigle).
[165] Submissions on Behalf of the Gamblers First Nation, October 24, 1996, p. 32.

In response, Canada contends that, if "conference" has the meaning proposed by the First Nation, Canada has satisfied the conference requirement of Treaty 4 in any event, and therefore the survey of 1877 fixed the date when the First Nation's population should be counted for treaty land entitlement purposes.[166] Canada points to at least five occasions when its representatives met with the Chief and others to discuss reserve selection:

- the initial conference in late August 1875 between Commissioners Christie and Dickieson for Canada and representatives of the Band, including the Gambler as "chief Orator";
- the meeting on August 3, 1876, involving Dickieson, Wagner, and Indian Agent Angus McKay, of which McKay reported that Waywayseecappo was not yet prepared to select his reserve because one of his headmen was absent;
- the meeting between the Chief and Wagner in December 1876 as the latter passed through on his way to Fort Pelly;
- Laird's interview or interviews with Waywayseecappo as reported in Laird's letter of May 9, 1877; and
- ultimately, the meeting between Wagner and Waywayseecappo in July 1877 during which the Chief instructed his son-in-law to point out the reserve to Wagner.[167]

Canada submits that it considered and complied with the wishes of the Band to have the reserve surveyed at the head of Bird Tail Creek.[168] As to the First Nation's complaint that the location of the reserve was moved and imposed unilaterally without any reasonable basis from the location agreed to by Christie and Dickieson in 1875, Canada counters that Wagner's concern about excluding "all the improvements made by the Chief and his families" amounted to a "valid explanation for not making the changes requested."[169]

In response to the First Nation's argument that objections were expressed by the Gambler and Waywayseecappo immediately following the 1877 survey, Canada submits that the entire Band nevertheless continued to reside on the reserve for at least three years until the surrender meeting in early 1881.[170] Even following the surrender, Waywayseecappo and his followers remained at Bird Tail Creek, and it was not many more years before the Gambler and most of his followers abandoned the reserve at Silver Creek and returned to Waywayseecappo's reserve at Bird Tail Creek (resurveyed as Lizard Point IR 62).[171]

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[166] ICC Transcript, November 6, 1996, p. 190 (François Daigle).
[167] ICC Transcript, November 6, 1996, pp. 188-89 (François Daigle).
[168] ICC Transcript, November 6, 1996, p. 185 (François Daigle).
[169] Supplementary Submissions on Behalf of the Government of Canada, May 9, 1997, p. 6.

Moreover, the only reason for the meeting in 1881 and the resurveys in 1883 was to implement the surrender. They did not occur because there was no reserve or the initial survey had not been properly done. According to Canada, if a reserve had not been properly set apart for the Band in the first place, there would have been no need for a surrender at all; the very fact of the surrender proposal "shows that all accepted that the survey had set aside the reserve."[172]

In the Commission's view, the evidence does not support the conclusion that Canada and the Fort Ellice Band reached any sort of binding agreement in 1875 because there was no consensus on the specific location of the reserve. Christie and Dickieson obviously believed that they were not in a position to commit the government because they were unsure whether Wagner could be instructed to survey a reserve for the Band within the limits of Treaty 2. We believe that the naming of the head of Bird Tail Creek as the preferred location in 1875 constituted no more than "the initial discussions in which an Indian band informs Canada's agents of its preferred location for a reserve," to use the language of the Lucky Man report. The specifics of the location, including the survey and the consensus between Canada and the Band that the lands so set apart would constitute the reserve, were still to come. Even if it might be considered that a conditional agreement had been reached subject to Canada obtaining approval of the reserve's location, there is other evidence which demonstrates that Band members had still not made up their own minds.

In his year-end report for 1875, Wagner indicated that the Fort Ellice Indians would likely choose their reserve in "the midst of the woods" where there would be plenty of timber,[173] the implication from this statement being that they had not yet chosen. Following the meeting on August 3, 1876, both Wagner and McKay reported that Waywayseecappo was not yet ready to decide on a reserve; McKay's comment that "they did not wish their reserves surveyed for the present as one of their head men was absent" is just as consistent with divisions within the Band over where the reserve should be located as with the Chief's deference to the Gambler on that issue. Still, we can infer from McKay's words that the location of the reserve had not yet been fully settled among band members. More explicit evidence of this can be found in Laird's letter of May 9, 1877, in which it will be recalled that he wrote:

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[170] ICC Transcript, November 6, 1996, p. 191 (François Daigle).
[171] ICC Transcript, November 6, 1996, pp. 199-200 (François Daigle).
[172] ICC Transcript, November 6, 1996, p. 191 (François Daigle).
[173] William Wagner, Dominion Land Surveyor, to Minister of the Interior, January 2, 1876, NA, RG 88, vol. 300, file 0644 (ICC Documents, pp. 105-06).

> *The delay in locating the Reserves of these Bands has been caused by disagreement among their members in making a selection. They appear to have settled their disputes* and expressed to me that they wish their Reserves to be located as follows:
>
> 1. 'Wawasecappo's, or the Fort Ellice Band.' Their selection is pretty much as mentioned in Messrs. Christie and Dickieson's report [of October 7, 1875]. They desire a Reserve to be surveyed for them at the head of Bird Tail Creek, on the road leading from Swan Lake via Shell River, used by the North West Mounted Police in travelling to Swan River Barracks. The site is about 24 miles from Shoal Lake, and about 36 miles from the mouth of the Shell River. They would prefer to have the Reserve on both sides of the Bird Tail Creek, but will, I trust, be content to have it all on the West side.[174]

This letter demonstrates that the Band had not finalized its own position regarding reserve selection until early 1877, and suggests that the final negotiations to arrive at a consensus with the Band were still forthcoming.

The Commission recognizes the concerns expressed by the First Nation regarding Laird's comment that, although Waywayseecappo's people wanted their reserve on both sides of Bird Tail Creek, they "will, I trust, be content to have it *all* on the West side."[175] Yet we cannot fail to notice that, although admittedly the lion's share of the reserve originally surveyed by Wagner was in fact situated to the west of Bird Tail Creek, the reserve nonetheless included land on the east side of the creek for fully 11 miles of its overall length of 11½ miles. In our view, Laird's statement represented little more than his own personal views as to the location of the reserve, and it appears that the position recommended by him was not fully implemented in any event.

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[174] David Laird, Lieutenant Governor and Indian Superintendent of the North-West Territories, to Minister of the Interior, May 9, 1877, NA, RG 10, vol. 3649, file 8187 (ICC Documents, pp. 141-44).

[175] David Laird, Lieutenant Governor and Indian Superintendent of the North-West Territories, to Minister of the Interior, May 9, 1877, NA, RG 10, vol. 3649, file 8187 (ICC Documents, pp. 141-44). Emphasis added.

Moreover, while it might have appeared, based on the evidence available to the First Nation when it prepared its submissions, that Wagner had coldly refused to consider the Gambler's request to change the location of the reserve, the additional documents tendered with Canada's supplementary written submission disclose that Wagner in fact had good reason to leave the reserve where he had originally surveyed it since the location proposed by the Gambler "would have excluded all the improvements made by the Chief and his families."[176] We must conclude that consideration of these improvements was just the sort of "reasonable limitation" discussed by counsel for Canada and admitted by counsel for the First Nation in their respective submissions. The additional documents further reveal that Wagner had apparently already resurveyed part of the reserve because he "found out that the place wished for was not in it."[177] After meeting with the Gambler, Wagner offered to move the reserve, but the Gambler refused this overture because he was dissatisfied with the *shape* of the reserve proposed by Wagner.[178] By the time the Gambler got back to Wagner to confirm that a reserve 12 miles by six miles would be acceptable, Wagner had already finished the job and submitted his plans and field notes, and was apparently unable to make further changes without express authorization from Ottawa.

What we see in this exchange is the sort of give and take that was surely an integral part of many reserve surveys. Canada and the bands made proposals and counterproposals, even as the reserves were being surveyed, before arriving at a compromise acceptable to both parties while at the same time perhaps not being all that either party might have desired. We consider Wagner's report on the survey of Sakimay's reserve, where he similarly refused to provide a reserve 40 miles long but eventually worked out a solution, as further evidence of this sort of compromise. It does not indicate that Wagner sought to dominate the Indians with whom he dealt or that he failed to survey in accordance with his instructions, but rather that he was firm in insisting on reasonable limitations in the configurations of the reserves he was called upon to survey. In this respect, we find the following comments of McKay to be significant:

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[176] William Wagner, Dominion Land Surveyor, to J.S. Dennis, Surveyor General, March 26, 1878, NA, RG 88, vol. 300, file 0644 (ICC Exhibit 12, vol. 4, tab 31, pp. 2-3).

[177] William Wagner, Dominion Land Surveyor, "Diary of Surveys of Indian Treaty No. 4 from 19 February 1877 to 26 February 1878," January 26, 1878 (ICC Exhibit 12, vol. 1, tab 3).

[178] William Wagner, Dominion Land Surveyor, to J.S. Dennis, Surveyor General, March 26, 1878, NA, RG 88, vol. 300, file 0644 (ICC Exhibit 12, vol. 4, tab 31, pp. 2-3).

> I found that the Indians were very much satisfied with Mr. Wagner and that he managed to impress them with confidence. I would respectfully recommend that he be given the survey of the Reserves for Indians on the Saskatchewan as I am convinced that he will give the greatest satisfaction to the Indians.[179]

In the final analysis, it appears to the Commission that Canada gave the Band precisely what it asked for: a reserve at the head and on both sides of Bird Tail Creek. Although the First Nation argues that Waywayseecappo and the man appointed by him had no authority to advise Wagner on land selection – an issue to which we will turn momentarily – the First Nation also admits that Wagner surveyed in accordance with the instructions given to him by these two Indians.[180] The Gambler raised concerns that Wagner sought to address, and in his later objection Waywayseecappo requested a reserve 40 miles long that, in our view, Wagner quite reasonably refused.

As counsel for the First Nation noted, after Waywayseecappo's objection there were no further documents on file for three years until the idea of a surrender surfaced with the arrival of the Sharman family on the south end of the reserve in November 1880. In our view, this lack of activity suggests that, notwithstanding the objections voiced by the Gambler and others, band members, at least initially, decided to reside on the reserve and use it for their collective benefit. There appears to have been a significant faction led by the Gambler that grew increasingly dissatisfied with the reserve, and, for that group, the arrival of the Sharmans presented Canada with a convenient opportunity to free up part of the reserve for settlers while providing the land at Silver Creek in exchange for the Gambler and his followers. We make no comment on the validity of the surrender or Canada's motives in securing it. What we do take from it, however, is the express recognition by the Gambler that Waywayseecappo was his Chief and that the reserve had been set apart for the entire Band. This recognition was, if anything, reinforced by the decision of the Gambler and many of his followers to return to Bird Tail Creek in 1887 and later to be restored to Waywayseecappo's band list.

Finally, with respect to the First Nation's argument that Canada never approved the 1877 survey by Order in Council but did approve the 1883 surveys, we caution against placing too much significance on this fact. It will be recalled that, in 1876, Z.A. Lash on behalf of the Deputy Minister of Justice expressed the opinion that "the survey and setting out of the reserve having been done with the express consent & approval of the Indians & having since been acquiesced in by them, no Order in Council is necessary; *but in as much as an Order in Council is a more formal record of the proceedings the undersigned recommends, for the avoidance of doubts, that one be passed approving of & confirming the reserve as already set apart*."[181] We have seen in earlier inquiries that the later practice of confirming reserves by Order in Council was not always the approach followed by the government. In fact, the 1889 Order in Council by which the 1883 surveys were confirmed also confirmed the reserves set apart for many other bands over the preceding two decades. For this reason, the Order in Council must be looked upon as more a matter of the government catching up on its housecleaning than anything of special significance to Waywayseecappo, the Gambler, and their followers. The reason that the 1877 survey was not referred to in the Order in Council was that, by 1889, it had already been replaced and superseded by the surveys in 1883 that divided the reserve at Bird Tail Creek into IR 63 for the Gambler at Silver Creek and Lizard Point IR 62 for Waywayseecappo and the others who elected to remain.

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[179] Angus McKay to Superintendent General of Indian Affairs, October 14, 1876, NA, RG 10, vol. 3642, file 7581 (ICC Exhibit 12, vol. 2, tab 25, pp. 26-27).

[180] Submissions on Behalf of the Gamblers First Nation, October 24, 1996, p. 19.

Authority of Laird and Wagner to Select Reserves

A further basis on which the Gamblers First Nation attacks the 1877 survey by William Wagner is that neither Wagner nor Laird was authorized to confer with the Indians and select reserves:

> The provisions of Treaty 4 were very specific and required the Government to appoint two officers who would act on behalf of the Government with respect to the selection of the reserves. As a result, only the two persons appointed in accordance with the Treaty would have the power to act as agent for the Government and bind them [sic] in that regard. Due to the certainty of the Treaty provisions, it is clear that only the commissioners specifically appointed for the purpose of selecting the Reserve had the power to do so and thus, no other person, regardless of their position in the Government, relationship with the Indians, or apparent authority, was authorized to act as agent of the Government in the selection of the Reserve. Due to the fact that Commissioners Christie and Dickieson were appointed under the Treaty as agents for the Crown for this purpose, they were the only two men permitted to do so. In other words, neither David Laird nor Mr. Wagner had been given the authority to act as the agent for the Government and therefore any agreements or actions by these two men, in relation to the selection of the Reserve, are not consistent with the Treaty.[182]

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[181] Z.A. Lash, Department of Justice, to Department of the Interior, August 12, 1876, NA, RG 10, vol. 3637, file 6853 (ICC Documents, p. 129). Emphasis added.

[182] Submissions on Behalf of the Gamblers First Nation, October 24, 1996, p. 28.

Canada's response is that, based on the decision of the Supreme Court of Canada in *J.E. Verrault & Fils Ltee v. Attorney General for Quebec*,[183] "a contract made by an agent of the Crown acting within the scope of his ostensible (apparent) authority is a valid contract by the Crown" and therefore binding on the Crown as principal.[184] As Lieutenant Governor and Indian Superintendent, Laird was "charged with the administration of the Treaty No. 4 area which included the lands in and about Birdtail [sic] Creek"[185] and thus presumably had at least apparent, if not express, authority to meet with the Indians to select reserves. With regard to Wagner, Canada submits that he acted within the limits of his authority and indeed recognized those limits by refusing to incur the additional expense of revising the survey as requested by the Gambler without first seeking the authorization of the Surveyor General.[186]

Treaty 4 states that "Her Majesty the Queen hereby agrees, through the said Commissioners, to assign reserves for the said Indians, such reserves to be selected *by officers of Her Majesty's Government of the Dominion of Canada appointed for that purpose*, after conference with each band of the Indians."[187] Although it is true that Christie and later Dickieson were appointed by Order in Council to select reserves, we see nothing in the words of the treaty to suggest that *only* Christie and Dickieson could perform, or could be authorized to perform, that function. Contrary to the position taken by the First Nation, the treaty does not refer to "*two* officers" but merely to "officers." Surely it was open to Canada to appoint as many "officers" as it might see fit to complete the task. Nor, in our view, was it necessary for such an "officer" to be given the title of "commissioner." Presumably a lieutenant governor or a surveyor could be considered an "officer" for the purposes of the treaty if part of their duties entailed selecting reserves on behalf of Indian bands. Similarly, Treaty 4 does not stipulate that the only appropriate officers would be those appointed by Order in Council and we suspect that less formal means of appointment would suffice.

In short, while there is no evidence before us to establish that Laird or Wagner were appointed by Order in Council to select reserves for those bands desiring them, we view them as having acted within the scope of their actual or implied authority[188] and thus having had the power to bind the Crown. Moreover, we see nothing in the subsequent actions of the Crown to suggest that the steps taken by Laird and Wagner were repudiated in any way, and indeed, even if they acted without actual or implied authority, their work appears to have been accepted and ratified by the Government of Canada. When the "surrender for exchange" proposal arose in 1880, Canada's representatives clearly operated under the assumption that the land set apart in 1877 constituted a valid and subsisting reserve.

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[183] *J.E. Verrault & Fils Ltee v. Attorney General for Quebec* (1975), 57 DLR (3d) 403 (SCC).
[184] Submissions on Behalf of the Government of Canada, October 29, 1996, p. 19.
[185] Supplementary Submissions on Behalf of the Government of Canada, May 9, 1997, pp. 6-7.
[186] Supplementary Submissions on Behalf of the Government of Canada, May 9, 1997, p. 6.
[187] *Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice* (Ottawa: Queen's Printer, 1966), 6. Emphasis added.

Ratification is distinguished by G.H.L. Fridman in *Fridman's Law of Agency* from the usual agency relationship where the agent's authority to act is granted ***before*** the exercise of that authority:

> With "ratification" the position is reversed. What the "agent" does on behalf of the "principal" is done at a time when the relation of principal and agent does not exist. . . . The agent, in fact, has no authority to do what he does at the time he does it. Subsequently, however, the principal, on whose behalf, though without whose authority, the agent has acted, accepts the agent's act, and adopts it, just as if there had been a prior authorisation by the principal to do exactly what the agent has done. . . . [R]atification by the principal does not merely give validity to the agent's unauthorised act as from the date of the ratification: it is antedated so as to take effect from the time of the agent's act. Hence the agent is treated as having been authorised from the outset to act as he did. Ratification is "equivalent to an antecedent authority".[189]

We note that the principle of ratification was applied in the context of a Crown agency relationship in *R. v. Howard*, where the Supreme Court of Canada held that, to the extent that the Treaty Commissioners in that case went beyond their original instructions in negotiating a treaty, the Government of Canada by its subsequent conduct demonstrated that it had been made aware of this fact and ratified the treaty as drafted in any event. The court held that there was no legal or constitutional requirement of an Order in Council to ratify the treaty in question.[190] We find that Canada at least implicitly ratified the reserve at Bird Tail Creek and therefore the First Nation's objection to the 1877 survey on this ground must fail.

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[188] G.H.L. Fridman in *Fridman's Law of Agency*, 7th ed. (Toronto: Butterworths Canada, 1996), 122-23, differentiates between implied and apparent authority in these terms:

> The apparent authority must be carefully distinguished from the *implied* authority, in particular that variety of implied authority which has been called *usual* authority, which some agents may possess over and above the express authority granted them by the principal. *Implied* (including in this context *usual*) authority is the authority which in fact the agent possesses as a result of the construction of his contract of agency in the light of business efficacy, or of the normal practices and methods of the trade, business, market, place, or profession, in which the agent is employed. *Apparent* authority, on the other hand, is the authority which, as a result of the operation of the legal doctrine of estoppel, the agent is considered as possessing, in view of the way a reasonable third party would understand the conduct or statements of the principal and the agent. Sometimes this is described as implied authority, on the ground that it is what a third party would expect an agent in such a position to possess in the ordinary course of events. Such use of the terms implied authority and usual authority, it is suggested, is a source of confusion.

[189] G.H.L. Fridman, *Fridman's Law of Agency*, 7th ed. (Toronto: Butterworths Canada, 1996), 84.

Waywayseecappo's Authority to Select Reserves

The next major thrust of the First Nation's challenge to the validity of the 1877 survey is that the lands were chosen by an unauthorized representative of the Band, resulting in a selection that is not binding on the First Nation.

First, the First Nation argues that there is uncontradicted evidence that the Gambler was expressly designated by both the Chief and the Band as the member who would select the reserve and advise the surveyor in marking out the reserve boundaries on behalf of the Fort Ellice Band.[191]

Second, the First Nation maintains that Waywayseecappo did not speak for the Fort Ellice Band on the matter of reserve selection; rather, at the meeting in 1875 the Gambler clearly expressed the Band's wishes regarding the location of the reserve. The Commissioners and Wagner all attended this meeting, at which the Gambler was acknowledged to be the "chief Orator" for the Indians, and, according to the First Nation, they must be considered to have known the Gambler and his role in reserve selection.[192] The First Nation submits that this role was confirmed, at least implicitly, by Waywayseecappo's reluctance to select reserve lands until 1877 and the Gambler's objection to the survey performed without his "approval." Later, the Gambler's role was also explicitly confirmed by the Gambler and Waywayseecappo in their remarks at the surrender meeting in 1881. As with its objections to the actions of Laird and Wagner, the First Nation submits that the survey of 1877 was not based on the agreement the First Nation claimed had been made between the authorized agents of the government and the Indians in 1875, but rather on the subsequent actions of individuals who had no authority to bind the principals in question.[193] Therefore, in the First Nation's submission, the survey of 1877 once again did not meet selection requirements of Treaty 4 and should not be considered binding.[194]

Canada takes the position that the evidence does not establish the Gambler's "appointment" to act for the Band in the selection of the reserve, nor does it establish the existence of an agreement between the Gambler and Commissioners Christie and Dickieson on the location of the reserve.[195] Counsel argued that, other than the Gambler's own speech at the surrender meeting in February 1881, there is no other reference to the Gambler being expressly chosen to act on behalf of the Band for the purpose of reserve selection and no evidence to establish that the Crown was aware of such an appointment.[196] The Gambler's speech was "after the fact" since it occurred four years after the reserve was selected and six years after the consultations at Fort Ellice began.[197] According to Canada, Wagner remained unaware of the Gambler's role even following the latter's objection in 1877 to the survey being done without his approval because, in Wagner's report of March 26, 1878, he figured that the reason for the Gambler's resistance was "probably to show me his influence."[198] Although the Gambler was a leading spokesman at the Treaty 4 negotiations, he was not, according to Canada, a Chief or headman and did not sign the treaty.[199] Instead, "Waywayseecappo was the one that [sic] was introduced as Chief . . . [a]nd this is important because this first meeting is really what sets the relationship between the two parties to the Treaty . . . and the continuing of the relationship."[200]

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[190] *R. v. Howard*, [1994] 2 SCR 299 at 300, [1994] 3 CNLR 146.
[191] Submissions on Behalf of the Gamblers First Nation, October 24, 1996, p. 28.
[192] Submissions on Behalf of the Gamblers First Nation, October 24, 1996, pp. 8-11.
[193] Submissions on Behalf of the Gamblers First Nation, October 24, 1996, p. 29.
[194] Submissions on Behalf of the Gamblers First Nation, October 24, 1996, p. 29.

Canada argues that Wagner was turned away by Waywayseecappo on at least three occasions without any indication from the Chief that the Gambler was the person to consult regarding reserve selection.[201] Although the First Nation suggests that it was consistent with Waywayseecappo's status as Chief to delay the survey rather than admit that only the Gambler had the authority to select the land,[202] the proper inference, according to Canada, is that the Chief deferred not because the Gambler had been appointed to select the reserve but because the Band had not yet decided where its reserve should be.[203] Because Waywayseecappo as Chief had the "apparent" – if not the actual – authority to express the wishes of the Band regarding reserve selection, Canada submits that his choice of land should be binding on that basis alone. However, any doubt was dispelled, in Canada's view, when the Band ratified the selection, first, by allowing Waywayseecappo to remain as Chief and, second, by voting to retain the remainder of the original reserve at Bird Tail Creek following the surrender for exchange.[204]

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[195] Submissions on Behalf of the Government of Canada, October 29, 1996, p. 15.
[196] Submissions on Behalf of the Government of Canada, October 29, 1996, p. 15
[197] ICC Transcript, November 6, 1996, p. 192 (François Daigle).
[198] Submissions on Behalf of the Government of Canada, October 29, 1996, p. 5.
[199] Submissions on Behalf of the Government of Canada, October 29, 1996, p. 3.
[200] ICC Transcript, November 6, 1996, pp. 186-87 (François Daigle).
[201] ICC Transcript, November 6, 1996, p. 197 (François Daigle).
[202] ICC Transcript, November 6, 1996, p. 217 (Paul B. Forsyth).
[203] ICC Transcript, November 6, 1996, p. 193 (François Daigle).

In general, the authority of an agent is derived from an agreement between the principal and the agent such that "one, called the ***agent***, is considered in law to represent the other, called the ***principal***, in such a way as to be able to affect the principal's legal position in respect of strangers to the relationship by the making of contracts or the disposition of property."[205] The Gambler, according to his surrender speech in 1881, as documented by McDonald, was chosen by Waywayseecappo and the Fort Ellice Band to select the Band's reserve, thereby making the Gambler the agent on behalf of the Chief and Band as principals. The absence of further documentary evidence demonstrating the existence of this relationship of principal and agent does not mean that the relationship did not exist. The Gambler's own speech, with which the Chief concurred, established this relationship, and that speech is entitled to weight in and of itself.

Therefore, the mere fact that the Gambler may not have been referred to in other documents as "agent for the Band" does not mean that he was not so appointed. Indeed we find that he was so appointed, at least initially.[206] However, a relationship of principal and agent created by an agreement between the parties may also be terminated either by both parties agreeing to its termination, or by one party unilaterally withdrawing from the original agreement. As G.H.L. Fridman states in ***Fridman's Law of Agency***:

> A. Agency created by act of parties . . .
>
> **Agreement, revocation and renunciation.** Since the relationship of principal and agent has been created by agreement between them, it follows that the relationship may be determined by both parties agreeing to the discharge of that relationship. It will also be determined if either party withdraws his original agreement. This will occur where the principal gives the agent notice of revocation of the agency or the agent gives the principal notice of renunciation. Any such notice may be given in any form: a deed or document in writing is unnecessary, even if the original authority was contained in a deed.[207]

Even assuming that these common law principles relating to the express or implied authority of agents applied to the internal affairs and governance of an Indian band in 1877 – and we make no finding in this regard – we see nothing in the circumstances of this case that would give rise to an irrevocable agency relationship between Waywayseecappo and the Gambler. That being the case, there is no reason why Waywayseecappo could not have revoked any authorization granted to the Gambler to select the reserve.

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[204] Submissions on Behalf of the Government of Canada, October 29, 1996, p. 16.

[205] G.H.L. Fridman, ***Fridman's Law of Agency***, 7th ed. (Toronto: Butterworths Canada, 1996), 11.

[206] Canada recognizes this fact, by arguing in the alternative that, if Gambler was appointed agent, he was in fact consulted by the Crown: Submissions of the Government of Canada, October 30, 1996, p. 16.

[207] G.H.L. Fridman, ***Fridman's Law of Agency***, 7th ed. (Toronto: Butterworths Canada, 1996), 389.

Therefore, we find that, by the time he protested to Wagner, the Gambler's authority to select land for the Fort Ellice Band had apparently ceased. Although there apparently was an initial agreement between Waywayseecappo and the Gambler that the latter would select the reserve, Waywayseecappo appeared to have revoked the Gambler's authority to act by directing another member of the Band to accompany Wagner and by allowing the survey to proceed without the Gambler's involvement. The initial acceptance by the Band of the reserve as surveyed in 1877 negates any reasonable argument that the Gambler objected to the location on behalf of the collective Band.

As to the effect of Waywayseecappo's revocation on Canada, we note the importance attached by Fridman to notice of such revocation being given by a principal to a third party:

> Unilateral revocation by the principal will not affect the third party as long as the agent is acting in an authorised or apparently authorised manner, unless and until the third party has notice of the fact that the agent's authority has been terminated. In other words, as long as the principal continues to "hold out" the agent as having authority to act on his behalf, he will be bound by transactions between the agent and third parties and the principal will continue to "hold out" the agent in this way, until the third party has notice that the agency has ended.[208]

We find this reasoning compelling in this case in that Canada, although aware of the Gambler's stature as a spokesman for the Band, was not informed of his role in selecting the reserve and apparently did not learn of it until he spoke at the surrender meeting on February 24, 1881. The proposition that Waywayseecappo was reluctant, for reasons of stature or otherwise, to divulge his lack of authority to select the reserve is pure speculation, and, even if true, should not be allowed to prejudice Canada's position. Canada clearly relied upon the reasonable impression conveyed by Waywayseecappo that he had the authority to bind his people. We conclude that Waywayseecappo had the apparent authority to commit the Band when he advised Wagner regarding land selection in 1877, and Canada's representatives were entitled to rely on the choices made by Waywayseecappo in the exercise of that authority.

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[208] G.H.L. Fridman, *Fridman's Law of Agency*, 7th ed. (Toronto: Butterworths Canada, 1996), 404.

Although the First Nation argues that the Gambler immediately objected to the location of the reserve on behalf of the whole Band, we must concur with Canada that, despite the Gambler's complaint, the Band originally accepted the reserve as surveyed. Subsequently, only the Gambler and his followers relocated while a substantial number of the Fort Ellice Band remained at Bird Tail Creek. Although there is evidence that Waywayseecappo and the Gambler made arrangements in 1877 so that those members of the Band who found the reserve unsuitable could go where they thought they could do better,[209] a substantial portion of the "Fort Ellice Band" under Chief Waywayseecappo's leadership apparently accepted the location of the reserve at Bird Tail Creek. And many of those who initially moved to the Silver Creek Reserve, including the Gambler himself, later returned to Bird Tail Creek.

In our view, the facts demonstrate that, even if Waywayseecappo was not authorized to select reserve land or could not revoke the Gambler's authority to do so, the Band, including the Gambler and his followers, ratified Waywayseecappo's selection by residing on the land at Bird Tail Creek following the 1877 survey. The remaining members of the Band further ratified the selection by electing to stay on the land following the departure of the Gambler and his followers in the wake of the 1881 surrender.

We also regard one other aspect of the surrender meeting to be telling. At no time did the Gambler or any other members of the Band suggest that the land to be given up was not part of their reserve. Indeed, the Gambler's request to give up part of the reserve in exchange for the new reserve at Silver Creek is more an affirmation of the reserve as surveyed by Wagner than a challenge to its validity. We note that "reserve" was defined in the 1876 ***Indian Act*** as "any tract or tracts of land set apart by treaty or otherwise for the use or benefit of or granted to a particular band of Indians, of which the legal title is in the Crown, but which is unsurrendered, and includes all the trees, wood, timber, soil, stone, minerals, metals, or other valuables thereon or therein."[210] The actions of the representatives of both Canada and the Band indicate that, following the survey in 1877, all of them regarded the land at Bird Tail Creek as having been set apart for the use and benefit of the Fort Ellice Band, notwithstanding the objections of the Gambler and his followers. The only reason a surrender became necessary was that, even if some members of the Band were dissatisfied with the configuration of the reserve, all nevertheless believed, as did Canada, that the land had been set apart on their behalf and constituted their reserve.

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[209] A. McDonald, Indian Agent, Shone Lake, NWT, to Government of Canada, Dept. of Indian Affairs, Ottawa, Ontario, February 24, 1881 (ICC Documents, pp. 253-54).

[210] ***Indian Act***, SC 1876, c. 18, s. 3(6).

In conclusion, we find that there was consensus between Canada and the Band on the selection of the reserve at Bird Tail Creek. However, this consensus was only achieved in 1877 following the survey by Wagner, at which time the Band signalled its acceptance of the reserve as surveyed by residing on and using the land for its collective benefit. No consensus had yet been established in 1875 at the time of the Band's preliminary designation of the general location in which it wanted its land. In our view, the 1877 survey was conducted in accordance with the requirements of Treaty 4 and was accepted by both Canada and the Band. Finally, there is no evidence before us that the selection and survey at Bird Tail Creek resulted in some manifest unfairness to the Gambler's Nation. We therefore conclude that the date of first survey for entitlement calculation purposes should be 1877 and not 1883.

ISSUE 2 IMPACT OF THE 1881 SURRENDER FOR EXCHANGE

To what extent, if at all, did the "surrender for exchange" in 1881 affect the treaty land entitlement of the claimants?

It will be recalled that the surrender for exchange in 1881 arose as a result of the dissatisfaction of the Gambler and his followers with the reserve at Bird Tail Creek and the manner in which it was surveyed. In 1881, Indian Commissioner Edgar Dewdney and the Deputy Superintendent General of Indian Affairs approved the surrender of 32 square miles of the Bird Tail Creek Reserve by the Fort Ellice Band, in exchange for an equivalent area for the Gambler Band at Silver Creek. Although counsel for the First Nation stated that the surrender for exchange had "no effect" on the First Nation's treaty land entitlement,[211] it is nevertheless the First Nation's position that the circumstances surrounding the surrender and the resulting surveys in 1883 support the contention that neither Canada nor the Band took the view that the survey of 1877 had fulfilled the treaty land entitlement of the Gambler and his followers.

The First Nation contends that these circumstances demonstrate that Canada did not meet the selection requirements of Treaty 4 in performing the

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[211] ICC Transcript, November 6, 1996, p. 150 (Paul B. Forsyth).

1877 survey. First, the Order in Council of May 30, 1879, appointing Edgar Dewdney as the Indian Commissioner for Treaties 4, 6, and 7 acknowledged Canada's failure to fulfill its treaty obligations and created Dewdney's position for the purpose of carrying out "in good faith and to the letter all Treaty Covenants."[212] Second, following the surrender for exchange, A.W. Ponton was instructed in April 1883 to resurvey Waywayseecappo's reserve and to survey a number of other reserves for Treaty 4 bands, including the new reserve for the Gambler. His instructions read in part:

> I have the honor by direction of the Honourable the Indian Commissioner to instruct you to proceed with as little delay as possible to Fort Ellice and there to report yourself to Mr. Indian Agent Herchmer for the purposes of laying out Reserves for Indians under Treaty No. 4. . . .
>
> The extent of the several Reserves which you may have to lay out will be governed by the number of souls in the Band in the manner fixed by the Treaty that is to say being one square mile for each family of five souls in each Band, or in that proportion.[213]

The First Nation argues that these instructions are important as they directed Ponton to fulfill the terms of Treaty 4 in his surveys for bands in that area. "Clearly," argues counsel, "the inference is that Canada itself in 1883 did not regard the earlier surveys as having laid out Reserves for Indians pursuant to the requirements of Treaty 4 in the Fort Ellice area"[214] and desired that the new survey work should do so.

By contrast, as we have already seen, it is Canada's position that the proper inference to be drawn from the 1881 surrender is that both Canada and the Band considered that the survey of 1877 had laid out a reserve for the Band, failing which there would have been no requirement for a surrender. Canada further argues that the 1883 resurvey of Lizard Point IR 62 merely identified the remaining land left after the 1881 surrender.[215] It is therefore Canada's position that the 1881 "surrender for exchange" does not affect the proposition that treaty land entitlement should be based on the 1877 survey of Bird Tail Creek.[216]

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[212] Order in Council, May 30, 1879 (ICC Documents, pp. 166-67).

[213] John C. Nelson, Dominion Land Surveyor, to A.W. Ponton, Dominion Land Surveyor, April 1, 1883, NA, RG 10, vol. 7770, file 27117-3, reel C-12056 (ICC Documents, pp. 346-47).

[214] Submissions on Behalf of the Gamblers First Nation, October 24, 1996, p. 31.

[215] Submissions on Behalf of the Government of Canada, October 29, 1996, p. 20.

[216] Submissions on Behalf of the Government of Canada, October 29, 1996, p. 20.

With respect to counsel for the First Nation, it is our view that the excerpts from Ponton's instructions have been taken out of context, or, more properly, have been given a meaning that is not warranted when all the surrounding circumstances are taken into account. It was clearly contemplated that Ponton would be surveying "several" reserves in the Treaty 4 area – including reserves for bands that had not yet received treaty land – and the general instructions given by Nelson to survey in accordance with the treaty formula of one square mile per family of five would obviously apply in such circumstances. However, Nelson also provided Ponton with the following instructions specific to the reserves for Waywayseecappo and the Gambler:

> You will confer specially with Mr. Agent Herchmer and receive instructions in respect to marking out the lines between the surrendered and the unsurrendered portions of the Reserve for the Band of the Way-way-see-cap.
>
> After the completion of the survey of the Way-way-see-cap reserve you will proceed to the reserve projected for the Gamblers Band and define its Boundaries . . .[217]

There is no indication in these instructions that Ponton was to calculate the treaty land entitlement for Waywayseecappo and the Gambler or to do anything other than identify the areas to be allocated to each in accordance with the terms of the surrender for exchange in 1881. Moreover, there is other evidence which demonstrates that, for all purposes, Canada believed that it had established a reserve for the Fort Ellice Band in 1877. As submitted by Canada, the very fact that a surrender was taken in 1881 for the exchange evidences a belief on the part of the government that the reserve already existed.

It is our view that in 1881 the parties did not intend to survey a new reserve but simply decided to surrender a specific portion of the existing reserve and to provide in exchange new land in the same proportion at Silver Creek to satisfy the Gambler and his people. The fact of the surrender for exchange does not give rise to the implication that there had always been two separate bands, or that the Gambler and his followers were seeking to have their new reserve set aside in accordance with the treaty formula. Rather, it is our conclusion that the surrender for exchange of 1881 was simply the result of a Band split and a decision to divide the existing land entitlement between the two factions. As the Gambler stated in his speech at the surrender meeting:

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[217] John C. Nelson, Dominion Land Surveyor, to A.W. Ponton, Dominion Land Surveyor, April 1, 1883, NA, RG 10, vol. 7770, file 27117-3, reel C-12056 (ICC Documents, p. 348).

> If we will be granted what we are asking for; *and I do not like to be refused by the Band* what I think will be allowed by the Government, *so if it will suit the Chief and the members of the Band in Council*, we will give up to the Government thirty-two (32) square miles of the south end of *our reserve.*[218]

It can be seen that the Gambler himself recognized that only one band existed at the time, and that the land at Bird Tail Creek constituted the Band's reserve. It is important to observe that both the First Nation and Canada intended to use the amount of land surrendered at Bird Tail Creek as the basis for determining the area of the reserve at Silver Creek; the evidence simply does not support the contention that the parties intended to use the treaty formula as the basis for the survey of these respective reserves. We therefore conclude that the surrender for exchange in 1881 did not in any way affect the basis upon which the treaty land entitlement of the Gamblers First Nation should be calculated. Accordingly, the appropriate date of first survey for the Gambler and his followers remains 1877 when they were part of the collective membership of the Fort Ellice Band under Chief Waywayseecappo.

On a final note, however, we wish to emphasize that our findings regarding the First Nation's date of first survey should not be taken as necessarily suggesting that we believe the First Nation has an adequate land base for its current needs. The oral evidence presented to us on November 5, 1996, made it abundantly clear that the First Nation is struggling to deal with a limited and inadequate land base, without even sufficient room for gardens or an adequate playground area for children. However, we understand that there are at present claims being advanced by the First Nation with respect to the discrepancy in the number of sections of land – 30 or 32 – to be surrendered for exchange in 1881, and with respect to the validity of later surrenders of reserve land by the First Nation. Although we are not prepared to rule on the merits of these other claims, we recognize that the First Nation, if it can successfully establish its position in those claims, might alleviate to some degree its current difficulty. Our sympathy for the First Nation's current situation must be tempered by the requirement that, with respect to the treaty land entitlement claim at present before us, we must adhere to existing principles involved in determining whether Canada owes the First Nation an outstanding lawful obligation.

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[218] A. McDonald, Indian Agent, Treaty 4, "Proceedings of a Council of Way-way-see-cappo's Band convened by the Chief and held in the Reserve, Bird Tail Creek," February 24, 1881 (ICC Documents, p. 255). Emphasis added.

PART V

RECOMMENDATION

Having concluded that the Gamblers First Nation has failed to establish that its date of first survey was 1883, and that the 1881 surrender for exchange had no impact on the basis for calculating the First Nation's treaty land entitlement, the Commission recommends:

That the Gamblers First Nation's outstanding treaty land entitlement, if any, should be calculated based on an 1877 date of first survey.

FOR THE INDIAN CLAIMS COMMISSION

Daniel Bellegarde Roger Augustine

Daniel J. Bellegarde Commission Co-Chair	Roger J. Augustine Commissioner	Carole T. Corcoran Commissioner

Dated this 22nd day of October, 1998.

APPENDIX A

GAMBLERS FIRST NATION TREATY LAND ENTITLEMENT INQUIRY

1 **Planning conference** Ottawa, June 14, 1996

2 **Community session** Binscarth, Manitoba, November 5, 1996

The Commission conducted a community session at the Binscarth Community Club at which the following members of the Gamblers First Nation testified: Chief Louis Tanner, Patrick Tanner, James Tanner, George Tanner, and Donna Tanner.

3 **Legal argument** Binscarth, Manitoba, November 6, 1996

4 **Content of formal record**

The formal record for the Gamblers First Nation Inquiry consists of the following:

- the documentary record (3 volumes of documents and annotated index, which were cumulatively marked as Exhibit 1)
- 11 other exhibits tendered during the inquiry, marked as Exhibits 2 to 12
- combined transcript of community session and oral submissions (1 volume)
- written submission of counsel for the Gamblers First Nation, dated October 24, 1996
- written submission and supplementary submission of counsel for Canada, dated October 29, 1996, and May 9, 1997, respectively

The report of the Commission and letters of transmittal to the parties will complete the formal record of this inquiry.

INDIAN CLAIMS COMMISSION

INQUIRY INTO THE CLAIM OF THE NEKANEET FIRST NATION

PANEL

Commission Co-Chair P.E. James Prentice, QC
Commissioner Roger Augustine

COUNSEL

For the Nekaneet First Nation
Thomas J. Waller, QC

For the Government of Canada
Patricia Rowe

To the Indian Claims Commission
David E. Osborn, QC / Kathleen Lickers

MARCH 1999

CONTENTS

PART I ***INTRODUCTION*** 95
Mandate of the Indian Claims Commission 97
The Claims Process 99
  The Commission's Planning Conferences 99

PART II ***HISTORICAL BACKGROUND*** 101
Background to the First Nation's Claim 101
  First Nation's Submissions 106
    1987 Nekaneet Claim Submission 106
    1996 Band Council Resolution 108
1998 Specific Claims Branch Report 108

PART III ***ISSUES*** 109

PART IV ***SUBMISSIONS*** 110
Farming and Agricultural Implements 110
Programs and Other Funding 112
Annual Payments to Members 112
Canada's Offer to Negotiate a Settlement 112

PART V ***CONCLUSION*** 113

APPENDICES 114
A 1987 Nekaneet Claim Submission 114
B Government of Canada's Offer to Accept Claim 132

PART I

INTRODUCTION

In February 1987, the Nekaneet First Nation submitted a specific claim to the Minister of Indian Affairs and Northern Development[1] seeking compensation under Treaty 4 for outstanding provisions of agricultural benefits, programs and services, annual payments to band members, and damages for failure to provide a reserve at the time of the treaty's signing in 1874. As of 1996, the First Nation had not received any indication from Canada whether the claim would be accepted for negotiation. On October 23, 1998, after the First Nation had entered the Commission's inquiry process, Canada offered to accept the Nekaneet's claim for negotiation of a settlement. As stated in Canada's acceptance letter, the Nekaneet claim is "the first agricultural benefits claim Canada has ever accepted under Treaty No. 4 and is the first historical claim for agricultural benefits accepted by Canada."[2]

The First Nation requested an inquiry into the claim by the Indian Claims Commission (the Commission) in August 1996.[3] Given that the Commission's mandate is to inquire into rejected claims and given that Canada had not responded to the claim, counsel for Nekaneet First Nation requested an advance determination as to whether Canada would challenge the mandate of the Commission to hear the matter.[4] A planning conference was held on November 21, 1996, at which time counsel for the Department of Indian Affairs and Northern Development (DIAND) did raise a preliminary mandate challenge.[5] The department stated that the Nekaneet First Nation claim, despite the fact it had been submitted ten years earlier, remained under review by the Specific Claims Branch and that the claim had not been rejected by DIAND.

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[1] Thomas Waller, QC, Counsel to Nekaneet First Nation, to Kathleen Lickers, Associate Legal Counsel, Indian Claims Commission, August 30, 1996, attaching both a Band Council Resolution approved by Chief and Council on August 29, 1996, and a copy of the original Claim Submission to the Minister of Indian Affairs and Northern Development by the Nekaneet Band No. 160A, dated February 16, 1987 (hereinafter 1987 Nekaneet Claim Submission) (reproduced as Appendix A).

[2] Warren Johnston, Assistant Deputy Minister, DIAND, to Chief Larry Oakes, Nekaneet First Nation, October 23, 1998 (Appendix B).

[3] Thomas Waller, QC, Counsel to Nekaneet First Nation, to Kathleen Lickers, Associate Legal Counsel, Indian Claims Commission, August 30, 1996.

[4] Thomas Waller, QC, Counsel to Nekaneet First Nation, to Kathleen Lickers, Associate Legal Counsel, Indian Claims Commission, November 12, 1996. See below for more information on Planning Conferences.

The First Nation took the position that DIAND's failure to respond to the claim for nearly ten years was tantamount to a rejection of the claim.[6] DIAND then informed the parties that this claim was now a priority and that DIAND would provide a response by May 1997. The First Nation consented to this time frame. Further, the Commission agreed, at the First Nation's request and DIAND's consent, to act as a facilitator on the claim.[7] In the view of the Commission, it is the very fact that the First Nation requested a Commission inquiry that pushed this claim forward.

Subsequently, correspondence was exchanged among the parties with a view to facilitating DIAND's review of the claim.[8] On July 25, 1997, the Commission scheduled a conference call which dealt with the status of the review.[9] DIAND informed the parties that it would provide a written response to the claim on August 1, 1997, and that the parties would meet on October 6, 1997, to discuss the response with members of the First Nation and their counsel.

On August 1, 1997, DIAND provided a written summary of the preliminary federal position on the claim of the Nekaneet First Nation claim on a "without prejudice" basis.[10] The preliminary position was to reject the claim, except for the entitlements to receive farming and agricultural implements, subject to additional research on the matter.

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[5] Indian Claims Commission, Planning Conference, Nekaneet First Nation, Treaty Entitlement for Benefits, Summary, Regina, November 21, 1996.

[6] Indian Claims Commission, Planning Conference, Nekaneet First Nation, Treaty Entitlement for Benefits, Summary, Regina, November 21, 1996. See also ICC, *Report on the Inquiry into the Claim of the Mikisew Cree First Nation* (Ottawa, March 1997), reported in (1998) 6 ICCP 183, for a discussion of constructive rejection.

[7] Indian Claims Commission, Planning Conference, Nekaneet First Nation, Treaty Entitlement for Benefits, Summary, Regina, November 21, 1996.

[8] Kathleen Lickers, Associate Legal Counsel, Indian Claims Commission, to Belinda Cole, DIAND, January 24, 1997; Kathleen Lickers, Associate Legal Counsel, Indian Claims Commission, to Cynthia Shipton-Mitchell, Acting Senior Counsel, Specific Claims, DIAND, March, 3, 1997; Cynthia Shipton-Mitchell, Acting Senior Counsel, Specific Claims, DIAND, to Kathleen Lickers, Associate Legal Counsel, Indian Claims Commission, March 6, 1997; Kathleen Lickers, Associate Legal Counsel, Indian Claims Commission, to Cynthia Shipton-Mitchell, Acting Senior Counsel, Specific Claims, DIAND, May 6, 1997; Kathleen Lickers, Associate Legal Counsel, Indian Claims Commission, to Cynthia Shipton-Mitchell, Acting Senior Counsel, Specific Claims, DIAND, June 6, 1997; Thomas Waller, QC, Counsel to Nekaneet First Nation, to Kathleen Lickers, Associate Legal Counsel, Indian Claims Commission, June 6, 1997; Kathleen Lickers, Associate Legal Counsel, Indian Claims Commission, to Thomas Waller, QC, Counsel to Nekaneet First Nation, and Perry Robinson, Policy Directorate, Specific Claims Branch, DIAND, June 17, 1997.

[9] Kathleen Lickers, Associate Legal Counsel, Indian Claims Commission, to Thomas Waller, QC, Counsel to Nekaneet First Nation, and Jocelyn Stoate, Specific Claims Branch, DIAND, July 25, 1997.

[10] Michel Roy, Director General, Specific Claims, DIAND, to Chief Larry Oakes, Nekaneet First Nation, August 1, 1997.

In response, the First Nation requested a letter of support from the Commission for its application to DIAND's Research Funding Division. To maintain its neutrality, the Commission declined to provide such support.[11] It did, however, offer to provide the Research Funding Division with a brief summary of the claim and its status at the Commission.[12]

On November 4, 1997, the Commission advised DIAND that the Nekaneet First Nation had entered the Commission's inquiry process and that additional research was therefore required.[13] The research, including an analysis of the claim, was provided by DIAND on March 27, 1998.[14] The Commission advised the parties of the status of the claim throughout the year.[15] On October 23, 1998, Canada offered to accept the First Nation's claim for negotiation of a settlement, with respect to its claim to agricultural benefits under Treaty 4; Canada also offered to negotiate ammunition and twine benefits.[16]

This report sets out the background to the First Nation's claim and is based entirely on the documents the First Nation provided to the Commission, as well as the March 1998 Specific Claims Branch Report.[17] In view of Canada's decision to accept the claim for negotiation of a settlement, no further steps have been taken by the Commission to inquire into the claim, and we make no findings of fact. This report contains a brief summary of the claim and is intended only to inform the public about the nature of the issues involved.

MANDATE OF THE INDIAN CLAIMS COMMISSION

The Commission was established in 1991 to assist First Nations and Canada in the negotiation and fair resolution of specific claims. The Commission is empowered to inquire into and report on whether or not Canada properly rejected a specific claim:

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[11] Seetal Sunga, Associate Legal Counsel, Indian Claims Commission, to Thomas Waller, QC, Counsel to Nekaneet First Nation, September 15, 1997.

[12] Seetal Sunga, Associate Legal Counsel, Indian Claims Commission, to Thomas Waller, QC, Counsel to Nekaneet First Nation, September 15, 1997.

[13] Seetal Sunga, Associate Legal Counsel, Indian Claims Commission, to Sharman Glynn, Chief, Research Funding Division, DIAND, November 4, 1997.

[14] Cover letter, Barb Frizell-Bear, Senior Policy Advisor, Policy and Research, Specific Claims Branch, to Ralph Keesickquayash, Associate Counsel, Indian Claims Commission, March 27, 1998, attaching Specific Claims Branch, T.M. Homik, Analysis of the Claim of the Nekaneet First Nation Regarding Agricultural Benefits, January 31, 1998 (hereinafter Specific Claims Branch Report).

[15] Ralph Keesickquayash, Associate Counsel, Indian Claims Commission, to Thomas Waller, QC, Counsel to Nekaneet First Nation, May 7, 1998; Ron Maurice, Commission Counsel, Indian Claims Commission, to Thomas Waller, QC, Counsel to Nekaneet First Nation, and Jocelyn Stoate, Specific Claims Branch, DIAND, May 7, 1998.

[16] Warren Johnson, Assistant Deputy Minister, DIAND, to Chief Larry Oakes, Nekaneet First Nation, October 23, 1998 (Appendix B).

[17] See discussion on page 108.

> AND WE DO HEREBY advise that our Commissioners on the basis of Canada's Specific Claims Policy published in 1982 and subsequent formal amendments or additions as announced by the Minister of Indian Affairs and Northern Development (hereinafter "the Minister"), by considering only those matters at issue when the dispute was initially submitted to the Commission, inquire into and report on:
>
> a) whether a claimant has a valid claim for negotiation under the Policy where that claim has already been rejected by the Minister; and
>
> b) which compensation criteria apply in negotiation of a settlement, where a claimant disagrees with the Minister's determination of the applicable criteria.[18]

If the Commission had completed the inquiry into the Nekaneet First Nation's claim, the Commissioners would have evaluated that claim based on Canada's Specific Claims Policy. DIAND has explained the policy in a booklet entitled *Outstanding Business: A Native Claims Policy – Specific Claims*.[19] In particular, the booklet states that, when considering specific claims:

> The government's policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding "lawful obligation," i.e., an obligation derived from the law on the part of the federal government.
>
> A lawful obligation may arise in any of the following circumstances:
>
> i) The non-fulfillment of a treaty or agreement between Indians and the Crown.
> ii) A breach of an obligation arising out of the *Indian Act* or other statutes pertaining to Indians and the regulations thereunder.
> iii) A breach of an obligation arising out of government administration of Indian funds or other assets.
> iv) An illegal disposition of Indian land.

The policy also addresses the following types of claims, which fall under the heading "Beyond Lawful Obligation":

> i) Failure to provide compensation for reserve lands taken or damaged by the federal government or any of its agencies under authority.

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[18] Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730, July 27, 1992, amending the Commission issued to Chief Commissioner Harry S. LaForme on August 12, 1991, pursuant to Order in Council PC 1991-1329, July 15, 1991; reprinted in (1994) 1 ICCP xv.

[19] DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services 1982), 20; reprinted in (1994) 1 ICCP 171-85 (hereafter *Outstanding Business*).

ii) Fraud in connection with the acquisition or disposition of Indian reserve land by employees or agents of the federal government, in cases where the fraud can be clearly demonstrated.[20]

The Commission has the authority to review thoroughly, with both the claimant and the government, the historical and legal bases for the claim and the reasons for its rejection. The *Inquiries Act* gives the Commission wide powers to conduct such an inquiry, to gather information, and even to subpoena evidence if necessary. If, at the end of an inquiry, the Commission concludes that the facts and law support a finding that Canada owes an outstanding lawful obligation to the claimant First Nation, it may recommend to the Minister of Indian Affairs and Northern Development that the claim be accepted for negotiation.

THE CLAIMS PROCESS

As outlined in *Outstanding Business*, a First Nation may submit its specific claim to the Minister of Indian Affairs, who acts on behalf of the Government of Canada. The claimant First Nation begins the process by submitting a clear and concise statement of claim, along with comprehensive historical and factual background on which the claim is based. The claim is referred to DIAND's Specific Claims Branch, which usually conducts its own confirming research into a claim, makes claim-related research findings in its possession available to the claimants, and consults with them at each stage of the review process.

Once all the necessary information has been gathered, the facts and documents will be referred to the Department of Justice for advice on the federal government's lawful obligation. Generally, if the Department of Justice finds that the claim discloses an outstanding lawful obligation, the First Nation is so advised, and the Specific Claims Branch will offer to enter into compensation negotiations.

The Commission's Planning Conferences

In view of the Commissioners' broad authority to "adopt such methods . . . as they may consider expedient for the conduct of the inquiry," they have placed great emphasis on the need for flexibility and informality and have encouraged the parties to be involved as much as is practicable in the planning and conduct of the inquiry. To this end, the Commission developed the planning conference as a forum in which representatives of the First Nation and Canada meet to discuss and resolve issues in a cooperative manner.

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[20] *Outstanding Business*, 20; reprinted in (1994) 1 ICCP 179-80.

Planning conferences have routinely been arranged and chaired by the Commission to plan jointly the inquiry process. Briefing material is prepared by the Commission and sent to the parties in advance of the planning conference so as to facilitate an informed discussion of the issues. The main objectives of the planning conference are to identify and explore the relevant historical and legal issues; to identify which historical documents the parties intend to rely on; to determine whether the parties intend to call elders, community members, or experts as witnesses; and to set time frames for the remaining stages of the inquiry, in the event that the parties are unable to resolve the matters in dispute. The first planning conference also allows the parties an opportunity to discuss whether there are any preliminary issues with regard to the scope of the issues or the mandate of the Commission.

Depending on the nature and complexity of the issues, there may be more than one planning conference. The parties are given an opportunity, often for the first time, to discuss the claim face to face. The parties themselves are able to review their position in the light of new or previously unrevealed facts and the constantly evolving law. Even if the planning conferences do not lead to a resolution of the claim and a formal inquiry process is necessary, they assist in clarifying issues and help make the inquiry more effective.

PART II

HISTORICAL BACKGROUND

BACKGROUND TO THE FIRST NATION'S CLAIM

As this claim was accepted before an inquiry was complete, the Commission makes no finding of fact. This background summarizes documents provided to the Commission by the First Nation and Canada.

The Nekaneet First Nation is located in southwestern Saskatchewan. On September 15, 1874, Treaty 4 was entered into between Canada and First Nations in the area. At that time, "Front Man" or "Foremost Man" (the English name for "Ne-can-ete") was the leader of what became known as the Nekaneet Band. This claim raises three questions of historical fact: whether Foremost Man and his followers were separate or a part of the Kahkewistahaw Band; whether they received treaty entitlements including reserve land; and whether they took up agriculture, thereby entitling them to agricultural benefits under Treaty 4.

The Nekaneet First Nation takes the position that, at the time Treaty 4 was signed by Chief Kahkewistahaw at Fort Qu'Appelle, Foremost Man was the leader of a separate band and was not at Fort Qu'Appelle at the time of the treaty's signing but was instead living in the area around Cypress Hills.[21] "Ne-can-ete," however, was noted on the 1875 and 1876 Treaty 4 paylists for the Kahkewistahaw Band.[22]

Treaty 4 includes the following obligations, which were undertaken by Canada:[23]

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[21] 1987 Nekaneet Claim Submission, p. 1.

[22] The historical context for the signing of Treaty 4 has been dealt with by the Commission in its March 1996 *Report on the Inquiry into the Treaty Land Entitlement Claim of the Kawacatoose First Nation*, and in the November 1996 *Report on the Inquiry into the Treaty Land Entitlement Claim of the Kahkewistahaw First Nation*, reported in (1996) 5 ICCP 73 and (1998) 6 ICCP 21, respectively. The Kahkewistahaw report has a more complete description of Foremost Man and his relationship to the Kahkewistahaw Band.

[23] "The Qu'Appelle Treaty, Number Four," September 15, 1874, reprinted in Alexander Morris, *The Treaties of Canada with the Indians* (1880; reprint, Toronto: Coles, 1979), 330-35, cited in Specific Claims Branch Report, attached doc. 1 [Note: The Specific Claims Branch Report contains numbered documents, which are attached to the report and/or included in the Appendix.]

> As soon as possible after the execution of this treaty Her Majesty shall cause a census to be taken of all the Indians inhabiting the tract hereinbefore described, and shall, next year, and annually afterwards for ever, cause to be paid in cash at some suitable season to be duly notified to the Indians, and at a place or places to be appointed for that purpose, within the territory ceded, each Chief twenty-five dollars; each Headman not exceeding four to a band, fifteen dollars; and to every other Indian man, woman and child, five dollars per head; such payment to be made to the heads of families for those belonging thereto, unless for some special reason it be found objectionable.
>
> Her Majesty also agrees that each Chief and each Headman, not to exceed four in each band, once in every three years during the term of their offices shall receive a suitable suit of clothing, and that yearly and every year She will cause to be distributed among the different bands included in the limits of this treaty powder, shot, ball and twine, in all to the value of seven hundred and fifty dollars; and each Chief shall receive hereafter, in recognition of the closing of the treaty, a suitable flag.
>
> It is further agreed between Her Majesty and the said Indians that the following articles shall be supplied to any band thereof who are now actually cultivating the soil, or who shall hereafter settle on their reserves and commence to break up the land, that is to say: two hoes, one spade, one scythe and one axe for every family so actually cultivating, and enough seed wheat, barley, oats and potatoes to plant such land as they have broken up; also one plough and two harrows for every ten families so cultivating as aforesaid, and also to each Chief for the use of his band as aforesaid, one yoke of oxen, one bull, four cows, a chest of ordinary carpenter's tools, five hand saws, five augers, one cross-cut saw, one pit-saw, the necessary files and one grindstone, all the aforesaid articles to be given, once for all, for the encouragement of the practice of agriculture among the Indians.

In short, there was a provision for entitlements to cash payments, clothing, ammunition, and twine, as well as to "cows and plows."

Annuity payments were provided to Foremost Man and his followers under Treaty 4 in 1881 and 1882 at Fort Walsh.[24] In 1882, Canada established a policy whereby only those bands that left the Cypress Hills and settled on reserves further north would receive their treaty benefits.[25] Foremost Man and his followers refused to relocate north. Then and now, the Nekaneet First Nation takes the position that it had been given a reserve near Maple Creek in 1881 by Canada.[26] In any event, the First Nation received no annuity payments between 1882 and 1975.

From 1882 to 1913, Canada denied that a reserve had been set aside for the Nekaneet First Nation, or otherwise for Foremost Man's followers and descendants.[27] The First Nation cites Indian Affairs correspondence to the effect that during this time period Canada was aware of a separate band that had not been allocated lands.[28] In 1913, Canada set aside a reserve of 1440 acres for the "band of Indians living in the vicinity of Maple Creek, in the Province of Saskatchewan."[29]

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[24] DIAND file 675/30-14-15-160A; A.E. St. Louis, "Straggling Indians of Cypress Hills and Vicinity," nd [c. 1945] (Specific Claims Branch Report, Appendix A, doc. 191). See also 1987 Nekaneet Claim Submission, p. 3.

[25] DIAND file 675/30-14-15-160A. A.E. St. Louis, "Straggling Indians of Cypress Hills and Vicinity," nd [c. 1945] (Specific Claims Branch Report, Appendix A, doc. 191). See also 1987 Nekaneet Claim Submission, p. 3.

[26] Specific Claims Branch Report, pp. 4-5; 1987 Nekaneet Claim Submission, pp. 3-4.

That same year, the Chief Inspector of Indian Agencies recommended that a farm instructor be placed on the Maple Creek Reserve, for the purpose of encouraging the cultivation of land "for gardens and small oat fields."[30] That recommendation was rejected, however. The Chief Inspector continued to ask for a farming instructor, and in 1914 Canada authorized an expenditure of funds to fence the reserve.[31]

Significantly, for the purposes of this claim, it appears that three requests for assistance were made by the First Nation. In 1961, a request was made for horses, as discussed below.[32] In 1914, two written requests were made by the Band for unspecified assistance. The first was a letter from a Band representative requesting that Canada dispatch someone "to look into the conditions of our little Reserve . . . as we find it hard to make a living under present conditions, as there is very little work going on at present – and would like the Government to assist us."[33] On visiting the reserve, the Inspector of Indian Agencies reported that assistance should not be granted "in the way of rations."[34] In his report, he further cautioned against attempts "to start these few Indians farming," since "their land is not adapted for it and it is not in a farming district." He went on to state: "[T]he Indians know nothing about farming and will never learn. They can grow a few potatoes every year, but this is all. . . . I saw a small patch of potatoes, poorly put in, and I doubt if they will get anything from it."[35] The Inspector's editorial comments notwithstanding, this report provides evidence that some farming was taking place on the reserve.

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[27] Specific Claims Branch Report, p. 5.

[28] 1987 Nekaneet Claim Submission, pp. 5-6.

[29] DIAND file 675/30-14-15-160A; Order in Council PC 2004, August 2, 1913 (Specific Claims Branch Report, attached doc. 4).

[30] National Archives of Canada (hereafter NA), RG 10, vol. 7779, file 27140, Glen Campbell to Duncan C. Scott, December 9, 1913 (Specific Claims Branch Report, attached doc. 5).

[31] Specific Claims Branch Report, p. 5.

[32] NA, RG 10, vol. 8829, file 675/15-8, pt. 4, Charles Oakes to Department of Indian Affairs, September 7, 1961 (Specific Claims Branch Report, attached doc. 61). See discussion on page 105.

[33] NA, RG 10, vol. 7779, file 27140, Crooked Legs to Minister of the Interior, May 29, 1914 (Specific Claims Branch Report, attached doc. 10).

[34] NA, RG 10, vol. 7779, file 27140, W.M. Graham to the Secretary, Department of Indian Affairs, June 20, 1914 (Specific Claims Branch Report, Appendix A, doc. 149).

[35] NA, RG 10, vol. 7779, file 27140, W.M. Graham to the Secretary, Department of Indian Affairs, June 20, 1914 (Specific Claims Branch Report, Appendix A, doc. 149).

The second request for "some assistance" in 1914 came from a member of the Maple Creek Band, on the basis that they were "absolutely destitute."[36] The letter went on to describe the state of their farming efforts:

> In this district this year there was a total failur[e] of crop and it was impossible for us to obtain anything from our land to sustain us this year and it is in consequence of [this] total failure of the crop that it has [compelled] us to apply to the government for assistance.[37]

On visiting the reserve, the Inspector arranged for the provision of rations for a dozen "old and infirm" members of the Band, and recommended that the Band be relocated to "one of the existing reserves where there is established management."[38] In his report, however, the Inspector determined that "there is a market for wood, pickets and hay and I understand they have about twenty-five loads of the latter for sale."[39] The Band refused to move.

Reports from Canada continued to recommend the relocation of the Band through to the mid-1950s, with the Band always refusing to move. The view of the department appears to have been based, rightly or wrongly, on the conclusion that the reserve was made up of lands unsuited for agricultural development.[40] For instance, in 1944, the department was advised that the Band had broken 15 acres of reserve land, and that there was not enough hay to feed the Band's own horses.[41] Another 1944 report indicated that the Band "showed a certain amount of initiative, they have worked out, generally well, in such work as Haying and harvest, repairing fences etc., and they have rented small parcels of land on shares near the Reserve to try and get their feed and some crop."[42]

In 1955, the Assistant Regional Supervisor of Indian Agencies, J.T. Warden, recommended that land adjacent to the reserve be purchased, as the existing reserve was well suited for pasture, and the proposed additional lands produced good crops of hay and coarse grains.[43] After further study and investigation, additional lands were set aside for the reserve in 1958 and funding was approved for the provision of farming equipment and livestock.[44]

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[36] NA, RG 10, vol. 7779, file 27140, Stoney Indian to Department of Indian Affairs, October 24, 1914 (Specific Claims Branch Report, Appendix A, doc. 151).

[37] NA, RG 10, vol 7779, file 27140, Stoney Indian to Department of Indian Affairs, October 24, 1914 (Specific Claims Branch Report, Appendix A, doc. 151).

[38] NA, RG 10, vol. 7779, file 27140, W.M. Graham to the Secretary, Department of Indian Affairs, November 19, 1914 (Specific Claims Branch Report, attached doc. 153).

[39] NA, RG 10, vol 7779, file 27140, W.M. Graham to the Secretary, Department of Indian Affairs, November 19, 1914 (Specific Claims Branch Report, attached doc. 153).

[40] Specific Claims Branch Report, pp. 5-9.

[41] NA, RG 10, vol. 7779, file 27140, M. Christianson to Indian Affairs Branch, May 3, 1944 (Specific Claims Branch Report, Appendix A, doc. 149).

[42] NA, RG 10, vol. 7779, file 27140, Sgt. Fleming to M. Christianson, July 14, 1944 (Specific Claims Branch Report, Appendix A, doc. 180).

The scant evidence available indicates that the Band successfully raised cattle in the ensuing decades. In 1961 the Band requested horses, pursuant to its understanding that Treaty 4 provided this benefit.[45] At the time, Canada expressed the view that Treaty 4 did not entitle the Band to a supply of horses,[46] but there is no evidence that the request was denied. In 1965, Band members owned 43 head of cattle, which increased to 60 head by 1968.[47] However, the Specific Claims Branch Report concludes that there is no evidence of the Band cultivating lands, nor of the Band receiving the agricultural equipment as proposed in the mid-1950s.[48] It appears that the department purchased one bull for the Band in 1958 and replaced it with another in 1963.[49]

No evidence was located that the Band ever received hunting and fishing supplies pursuant to treaty entitlements.[50] In 1976, Canada denied any entitlement to hunting and fishing supplies to the Band,[51] and as late as 1985 the evidence indicates that the Nekaneet First Nation received no such treaty entitlements.[52]

In 1975, Canada determined that members of the First Nation were entitled to annuities by virtue of the fact that treaties had been executed on behalf of their ancestors "by the Chiefs of the Bands to which they then belonged." Further, Canada paid the Band members in accordance with the terms of Treaty 4, on the basis that their reserve was located in territory under that treaty. According to the Specific Claims Branch Report, Canada "subsequently" determined that the Band was entitled to Treaty 4 benefits, subject to the treaty's terms.[53]

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[43] DIAND, J.T. Warden to Indian Affairs Branch, Reserves and Trusts Division, September 19, 1955 (Specific Claims Branch Report, attached doc. 40).

[44] Specific Claims Branch Report, pp. 12-17.

[45] NA, RG 10, vol. 8829, file 675/15-8, pt. 4, Charles Oakes to Department of Indian Affairs, September 7, 1961 (Specific Claims Branch Report, attached doc. 61).

[46] NA, RG 10, vol. 8829, file 675/15-8, M.G. Jutras to Regional Supervisor, Saskatchewan, October 18, 1961 (Specific Claims Branch Report, attached doc. 62); NA, RG 10, vol. 8829, file 675/15-8, R.F. Battle to Superintendent, File Hills–Qu'Appelle Agency, September 15, 1961 (Specific Claims Branch Report, attached doc. 63).

[47] DIAND file 675/23-12, vol. 2, "Annual Inventory of Livestock – Year-end-Inventory as at December 31, [1965]" (Specific Claims Branch Report, attached doc. 65; DIAND file 675/15-8, vol. 5, "Project/Design Authority – 1969-70" (Specific Claims Branch Report, attached doc. 66).

[48] Specific Claims Branch Report, p. 15.

[49] NA, RG 10, vol. 7779, file 27140, M.G. Jutras to Regional Supervisor, Saskatchewan, March 21, 1961 (Specific Claims Branch Report, attached doc. 59); NA, RG 10, vol. 7779, file 27140, H.A. Matthews to Regional Supervisor, Saskatchewan, July 9, 1963 (Specific Claims Branch Report, Appendix A, doc. 64).

[50] Specific Claims Branch Report, p. 15.

[51] DIAND file 675/28-3, vol. 8, Director General, Operations to Distinct Manager, Touchwood File Hills–Qu'Appelle District, June 11, 1976 (Specific Claims Branch Report, Appendix A, doc. 72).

[52] Specific Claims Branch Report, p. 19.

This summary reflects the evidence available to date. The Specific Claims Branch Report advises that the evidence available was often incomplete, in part because of DIAND's own practices.[54]

First Nation's Submissions

1987 Nekaneet Claim Submission

The 1987 Nekaneet Claim Submission[55] sought compensation for Canada's alleged failure to provide the following: "farm implements, equipment and suppliers [sic] to the band"; "program and other funding to the band"; and "annual payments to members of the band." In addition, the Band sought damages "resulting from the Crown's failure to establish a reserve for members of the band between the signing of Treaty No. 4 and 1913, when lands were first set apart for the use and benefit of the band members."[56]

The submission refers to facts covering the period from 1874 to the time of its writing in 1987. The evidence cited "relied extensively upon research previously done including a report prepared by Dr John L. Tobias for the Federation of Saskatchewan Indian Nations."[57] The First Nation notes that independent verification of that research was not feasible, but that it believes that the information is accurate. Accordingly, the secondary sources cited in the report are not attached as evidence. Instead, references are made to originals that may be obtained from "archival materials of Canada in Ottawa."[58] Such references date from 1874 to 1957. The only reference to events subsequent to 1987 is the submission's final statement in the section entitled Historical Facts:

> To this day, the band faces enormous problems in attempting to maintain its members. There are few jobs on the reserve. The land itself continues to be incapable of supporting economic activity to an extent which can benefit more than a very few band members. The vast majority of band members seeking employment are forced to

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[53] DIAND file E4058-3, vol. 1, J.R. Wright to David Lee, December 3, 1981 (Specific Claims Branch Report, attached doc. 3).

[54] Specific Claims Branch Report, p. 1: "[T]he study was hampered by a lack of extensive documentation concerning the Band's activities over the years. Some of this was due to the Band's isolation and the belief among some Department officials that the Band was not entitled to treaty benefits. In other cases, Departmental files that potentially could have shed light on the Band's activities have been destroyed."

[55] See Appendix A.

[56] 1987 Nekaneet Claim Submission, p. 1.

[57] 1987 Nekaneet Claim Submission, p. 2.

[58] 1987 Nekaneet Claim Submission, p. 2.

> look off the reserve. The situation can only improve if the band obtains land which can be used as a basis for farming, ranching or other enterprises.[59]

The remainder of the First Nation's submissions on historical facts generally anticipate the evidence cited in the Specific Claims Branch Report.

The Band submits that an "outstanding 'lawful obligation'" arises from the non-fulfilment of Treaty 4 and the breach of the *Indian Act*, pursuant to Canada's Specific Claims Policy. The submission asserts that entitlement to benefits under Treaty 4 is borne out by both the evidence and Canada's own conduct, including the payment of annuities in 1881 and 1882 to Foremost Man and his followers, and the establishment of a reserve in 1913. The Band further submits that DIAND "has, since 1968, recognized the band as a separate band," and later states that economic payments "were resumed in 1968."[60] The latter statement of fact is not referred to in the submission's own section on Historical Facts; nor does it appear in the body of the submission. Nor does the Specific Claims Branch Report indicate any evidence supporting this particular fact.

The First Nation goes on to make submissions respecting the Crown's fiduciary duty to the claimants, citing *Guerin v. The Queen* in support.[61] The 1987 submission states that the duty was recognized by the Crown in its rendering of economic benefits, however sporadic; by its attempts to relocate the First Nation throughout this century; and by its establishment of the reserve near Maple Creek. The Crown's breach of this fiduciary duty is "clear from a review of the history of the band," and further arises from "the total abdication of the Department's responsibility" to the First Nation.[62] The 1987 Nekaneet Claim Submission states repeatedly that for many years Canada has been aware of the nature and extent of the First Nation's claim.[63]

The 1987 Nekaneet Claim Submission seeks the validation of the claim "as quickly as possible." The compensation sought is described only as "substantial," and it is conceded that "some additional work will be required prior to presenting a full and detailed claim for compensation." Further, the First Nation seeks "funding to more accurately determine the extent of the compensation." The authors and their counsel express their willingness to meet with DIAND officials and to assist in any further research required to move the process forward, for which an "early response" is requested.[64]

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[59] 1987 Nekaneet Claim Submission, p. 9.

[60] 1987 Nekaneet Claim Submission, p. 11.

[61] Specific Claims Branch Report, pp. 11-12. Note that, at the time of its writing, *Guerin v. The Queen*, [1984] 2 SCR 355, was the leading case on point.

[62] Specific Claims Branch Report, pp. 12-13.

[63] Specific Claims Branch Report, pp. 2, 14.

1996 Band Council Resolution

The Nekaneet First Nation passed a Band Council Resolution on August 29, 1996, requesting that the Indian Claims Commission conduct an inquiry into its 1987 claim, and authorizing the disclosure of relevant reports to the Commission.[65] The resolution attaches the 1987 Nekaneet Claim Submission. The resolution's preamble states that "the claim has never formally been rejected or accepted by Canada for negotiation although there has been some indication from Departmental officials that Canada believes the scope of the claim is outside of the Specific Claims Policy."

1998 SPECIFIC CLAIMS BRANCH REPORT

The March 1998 report prepared by Teresa Homik for the Specific Claims Branch on the Nekaneet claim includes the following observations and conclusions:

> [T]he evidence does not indicate that the Band made any clear unequivocal "election" or statement that they intended to take up agriculture. . . . The evidence does indicate, however, that the Band did cultivate gardens as early as 1914 . . .
>
> The evidence of agricultural activity on the Reserve in the 1950's is far less equivocal. . . . [H]owever, no evidence was located that would indicate that the Band received implements or agricultural supplies, other than the bulls discussed above. It also appears that they did not receive treaty hunting and fishing supplies, due to the belief on the part of the Department officials that they were not entitled to those benefits. . . .
>
> In conclusion, therefore, it may be observed that there exists no clear evidence that the Band ever articulated an intention to cultivate or made an express request for farming supplies, other than a 1961 request for horses pursuant to a belief that Treaty 4 provided this benefit. The evidence does not clearly establish that the above request was denied, but it is clear that Departmental officials felt that there was no treaty obligation to provide horses. . . .
>
> It may also be observed that the Band actually carried on certain agricultural activities, albeit in a primitive way, beginning in 1914. These activities ranged from gardens, which apparently failed to the cultivation of feed and forage crops for horses, and culminated in a small scale cattle raising in the 1960's.[66]

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[64] Specific Claims Branch Report, p. 14.

[65] Nekaneet First Nation, Band Council Resolution, August 29, 1996.

[66] Specific Claims Branch Report, pp. 20-21.

PART III

ISSUES

The Nekaneet claim to the Minister raises issues of whether, under Treaty 4, there was an existing and outstanding lawful obligation on the part of Canada to provide agricultural, economic, and other benefits to the First Nation. As stated in the 1987 claims submission, the Nekaneet First Nation seeks compensation for Canada's alleged failure to provide farm implements and equipment, program and other funding, and annuities. The Nekaneet also seek damages resulting from the federal government's failure to establish a reserve until 1913. These issues hinge on the questions of historical fact just discussed. Did the Nekaneet First Nation exist as a Band separate from the Kahkewistahaw in 1874, therefore entitling the Nekaneet to treaty land and other benefits? Did the Nekaneet take up agriculture, therefore entitling them to treaty agricultural benefits?

PART IV

SUBMISSIONS

As discussed previously, the parties initially disagreed as to whether the Commission was authorized to conduct an inquiry. The question was whether the First Nation's claim had been rejected by the Minister. In 1996, the claimant asked the Commission to conclude that DIAND's conduct in the almost 10 years since the First Nation submitted its claim was tantamount to a rejection.[67] DIAND's preliminary position was that a lawful obligation did not arise out of the claim, subject to the following finding, as stated in its letter of August 1, 1997:

> However, with respect to the First Nation's allegation that Canada was obligated to provide the First Nation with farming and agricultural implements, it is our position that the Nekaneet First Nation may be entitled to receive farming implements if its members choose to take up the pursuit of cultivating the soil or raising stock on reserve. Nonetheless, additional research may be required to determine whether or not the First Nation received this entitlement in the past.[68]

DIAND discussed each of the First Nation's claims under the following headings.

FARMING AND AGRICULTURAL IMPLEMENTS

As discussed in DIAND's letter, Treaties 4 and 6 provide for certain farming and agricultural implements to be supplied to First Nations for purposes of self-sufficiency. The articles, machines, and cattle referred to in the treaties were to be given "once and for all, for the encouragement of the practice of agriculture among the Indians." The treaties stipulate that the quantity of the equipment provided is determined on a per family basis, if the family chose an agricultural way of life. That is, Treaty 4 states that the items are to be supplied to any Treaty 4 First Nation:

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[67] See page 108 for a discussion of the 1996 Band Council Resolution.

[68] Michel Roy, Director General, Specific Claims, DIAND, to Chief Larry Oakes, Nekaneet First Nation, August 1, 1997.

> who are *now actually* cultivating the soil, or who shall hereafter settle on their reserves and commence to break up the land, that is to say: two hoes, one spade, one scythe and one axe for every family *so actually cultivating*, and enough seed wheat, barley, oats and potatoes to plant such land as they have broken up; also one plough and two harrows for every ten families *so cultivating as aforesaid*, and also to each Chief for the use of his band as aforesaid, one yoke of oxen, one bull, four cows, a chest of ordinary carpenter's tools, five hand saws, five augers, one cross-cut saw, one pit-saw, the necessary files and one grindstone.[69]

DIAND then described the prerequisite elements for receipt of farming and agricultural implements as follows: "1. The band must elect a reserve; and 2. The band must elect a) to cultivate their soil or b) to raise stock."[70]

DIAND denied that there was an outstanding lawful obligation to provide the farming and agricultural entitlements until such time as "the First Nation chooses, after reserve land has been selected, to take up the pursuit of cultivated the soil or raising stock." On request and receipt of such implements, the obligation will be fulfilled.[71]

According to DIAND, there remained a question of fact that required "additional research to determine whether the First Nation received this entitlement in the past." If the 1987 claim constituted an election or request for the implements, then these entitlements would be provided "based on the number of families who state their intention to cultivate the soil and raise cattle on reserve."[72] According to DIAND, the First Nation could instead elect to "continue the traditional activities of hunting and fishing," in which case it would be entitled to ammunition and twine.[73]

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[69] "The Qu'Appelle Treaty, Number Four," September 15, 1874, reprinted in Alexander Morris, *The Treaties of Canada with the Indians* (1880; reprint, Toronto: Coles, 1979)), 330-35, cited in Specific Claims Branch Report. Emphasis added.

[70] Michel Roy, Director General, Specific Claims, DIAND, to Chief Larry Oakes, Nekaneet First Nation, August 1, 1997.

[71] Michel Roy, Director General, Specific Claims, DIAND, to Chief Larry Oakes, Nekaneet First Nation, August 1, 1997, p. 3.

[72] Michel Roy, Director General, Specific Claims, DIAND, to Chief Larry Oakes, Nekaneet First Nation, August 1, 1997, p. 3.

[73] Michel Roy, Director General, Specific Claims, DIAND, to Chief Larry Oakes, Nekaneet First Nation, August 1, 1997, p. 3.

PROGRAMS AND OTHER FUNDING

DIAND asserted that there was no outstanding lawful obligation to DIAND programs and services as there was no evidence provided to DIAND indicating "what, if any program and services it applied for, and whether [or] not it has ever been denied access to any such programs or services."[74]

ANNUAL PAYMENTS TO MEMBERS

As the right to annuity payments is personal, DIAND stated that the Specific Claims Policy did not entitle First Nations to advance claims on behalf of its members. "Any outstanding annuity payments that can be recovered by living members of the First Nation, must be recovered by these members directly." To initiate that process, DIAND provided information for contacting the relevant official. A separate official was identified for the purposes of bringing a claim for treaty annuities for deceased band members.[75]

In sum, on August 1, 1997, Canada denied that there was an outstanding lawful obligation, but raised the possibility that agricultural entitlements may be outstanding, subject to further research. As discussed previously, research was provided by DIAND on March 27, 1998.[76]

CANADA'S OFFER TO NEGOTIATE A SETTLEMENT

On October 23, 1998, Canada offered to accept the First Nation's claim to agricultural benefits under Treaty 4 for negotiation of a settlement; as well, Canada offered to negotiate ammunition and twine benefits.[77] According to Canada, this was the first agricultural benefits claim Canada had ever accepted under Treaty 4, and the first historical claim for agricultural benefits accepted by Canada.[78] As a result, the Commission has suspended this inquiry.

---

[74] Michel Roy, Director General, Specific Claims, DIAND, to Chief Larry Oakes, Nekaneet First Nation, August 1, 1997, p. 3.

[75] Michel Roy, Director General, Specific Claims, DIAND, to Chief Larry Oakes, Nekaneet First Nation, August 1, 1997, p. 4.

[76] Specific Claims Branch Report.

[77] Warren Johnson, Assistant Deputy Minister, DIAND, to Chief Larry Oakes, Nekaneet First Nation, October 23, 1998 (Appendix B).

[78] Warren Johnston, Assistant Deputy Minister, DIAND, to Chief Larry Oakes, Nekaneet First Nation, October 23, 1998 (Appendix B).

PART V

CONCLUSION

Since, at the date of this report, the Minister has agreed to negotiate the claim, the Commission has suspended its inquiry. We make no findings of fact or any comment on the merits of the First Nation's claim for economic benefits under Treaty 4. This report has set out the background to the First Nation's claim, based on documents the First Nation provided, and Canada's response thereto. In making this report, we wish again to affirm that it is essential that procedural and systematic issues in the specific claims process not be allowed to frustrate the timely determination of individual claims, or the timely negotiation and settlement of those claims that have been accepted by Canada for negotiation. Just as fairness was the criterion governing the decision to conduct a Commission inquiry into the First Nation's claim, so fairness to the parties must be the criterion that guides the conduct of both sides in seeking the resolution of a First Nation's claim.

FOR THE INDIAN CLAIMS COMMISSION

Roger Augustine

P.E. James Prentice, QC
Commission Co-Chair

Roger J. Augustine
Commissioner

Dated this 17th day of March, 1999.

APPENDIX A

1987 NEKANEET CLAIM SUBMISSION

SUBMISSION

TO

THE MINISTER OF INDIAN AND NORTHERN AFFAIRS

BY THE NIKANEET BAND NO. 160A

February 16, 1987

INDEX

Page

I INTRODUCTION.. 1

II HISTORICAL FACTS.................................... 3

III BAND'S POSITION..................................... 10

IV CONCLUSIONS... 14

V FOOTNOTE REFERENCES................................. 15

CLAIM OF NIKANEET BAND NO. 160A

I INTRODUCTION

This submission is a summary of the claim of the Nikaneet Indian Band No. 160A arising out of the Government of Canada's failure to provide funding to the band and band members during a period extending from 1883 until 1968. The submission is made to the Minister under the government policy entitled "Outstanding Business, a Native Claims Policy."

The band seeks a recognition of the validity of its claim together with compensation for losses and damages sustained. The claim is made on the basis of a failure on the part of Canada to honour the terms of Treaty No. 4 and on the basis of Canada's failure to provide benefits to the band under the terms of the Indian Act as well as on the basis of a breach of the duty owed by the Crown to the band and its members.

Compensation is sought for Canada's failure to provide the following:

1. the failure to provide farm implements, equipment and suppliers to the band,
2. the failure to provide program and other funding to the band, and
3. the failure to provide annual payments to members of the band.

The claim also includes a claim for damages resulting from the Crown's failure to establish a reserve for the members of the band between the signing of Treaty No. 4 and 1913, when lands were first set apart for the use and benefit of band members.

The federal government is aware of many aspects of the within claim since consideration of the historical material was given prior to validation of the band's entitlement claim.

In preparing this submission references are included in the footnotes to historical records or documents. The originals of this documentation are found in the archival materials of Canada in Ottawa. Footnote references which are contained in this submission have relied extensively upon research previously done including a report prepared by Dr. John L. Tobias for the Federation of Saskatchewan Indian Nations. The claimants believe that the footnote references are accurate but have not had the financial resources to verify such footnotes in all cases.

I HISTORICAL FACTS

The facts, which the band submits are relevant to the claim, are briefly summarized as follows:

1. The Nikaneet Band (as it is now known) joined Treaty No. 4 in 1874 under the leadership of Frontman or Foremost Man. [1.] Although some of the internal documentation of the Department of Indian Affairs and Northern Development (the Department) suggests that Foremost Man was associated with the Kakuwistahaw Band, the band's view is that Foremost Man was the leader of a separate band. At the time of signing of Treaty No. 4 Foremost Man was not in Qu'Appelle but was in the west in the area around Cypress Hills.
2. Under the terms of Treaty No. 4, Indians were promised annual cash payments in the following terms:

> "As soon as possible after the execution of this Treaty, Her Majesty shall cause a census to be taken of all Indians inhabiting the tract hereinbefore described, and shall, next year, and annually afterwards for ever, cause to be paid in cash at some suitable season to be duly notified for that purpose, within the territory ceded, each Chief $25.00; each headman not exceeding four to a band, $15.00; and to every other Indian man, woman and child, $5.00 per head; such payment to be made to the heads of families for those belonging thereto, unless for some special reason it be found objectionable."

The Treaty also included terms for the provision of farm implements, equipment and other supplies. [2.]

3. It is clear from records at the Department that Treaty payments were made to Foremost Man's band in 1881 and in 1882. According to the Department's records the annuity pay list for 1881 showed a band consisting of 428 persons

- 4 -

receiving payments. In 1882, the pay list showed 300 persons as having been paid. 3.

4. After 1882, annual payments were not made by the Department until they were resumed in 1968.

5. Following 1882, various reasons were advanced by the Department for not making payments. However, these reasons appear to relate either to the expense of administering a single reserve in the area or the view of some that the presence of the band in the Cypress Hills near the Canada/United States border might cause an international incident. 4.

6. It is clear from the Department records that Foremost Man had been promised a reserve in 1881 and in 1884 still was pursuing his selection. 5.

7. Promises were made to establish a reserve if the band moved north and pressure was put on the band, particularly following the Riel rebellion in 1886. It is apparent that Commissioner Dewdney was of the view that the band should be offered a reserve near Last Mountain. Commission Dewdney was not successful in obtaining agreement from the band on the relocation and was not authorized to carry out his alternate plan of jailing the Chief in an attempt to force the band to move. 6.

8. It is apparent that the band remained as a unit, their numbers in fact increasing by the addition of other Indians dissatisfied with their Chiefs or reserves. This larger group appears to have divided into two with one group

centered around Medicine Hat. The second group however remained with Foremost Man in the Maple Creek area. [7]

9. It is clear from the Department's files that the local population around Maple Creek regarded Foremost Man's band as an Indian band. [8] In February, 1896, a petition was forwarded to the Minister of the Interior asking that the band be given a reserve in the Cypress Hills promised to it in 1881. [9]

10. In 1906 the Indian Commissioner, David Laird, suggested the establishment of a reserve near the Mounted Police barracks in the Cypress Hills. [10] The Department however followed the recommendation of Agency Inspector Campbell to the effect that so long as the band remained inoffensive to the settlers and no complaints were heard, no action should be taken. [11]

11. Frank Pedley, then the Deputy Superintendent General of Indian Affairs, in a letter to William Graham, Inspector of Indian Agencies in the region, acknowledged that there were members of the band who had not been allocated lands. This correspondance reads, in part, as follows:

> "...these appear to be of two classes, vis, some who belong to bands for whom reserves had been provided in the past, but have refused to live thereon, and some for whom no such provision has been made."
>
> "...With regard to the Stragglers for whom lands have not been already provided, and the others if it should be deemed advisable to let them all keep together, the question presents itself as to where and what quantity lands should be allocated to them, and this would seem to depend largely upon the means by which they propose to earn their maintenance in the event of their being willing to take up agriculture, etc. The further question arises as to whether they would require a

> farming instructor and what assistance in the form of rations, implements, etc., etc. would be necessary. Of course the numbers in each class have to be ascertained." [12]

It is submitted that this correspondence establishes clearly that the Department was aware and recognized there was a separate band which had not been allocated lands. The correspondence also clearly established the fact that farming equipment and implements promised under the Treaty had not been provided.

12. On August 2, 1913, an Order in Council was passed setting aside Sections 24, 25 and a portion of Section 26 in Township 9, Range 25, W 3rd Meridian, for the Maple Creek Band. This action was taken in spite of the objection of Inspector Graham who continued in his efforts to have the band moved north. [13]

13. From about 1925 until 1968, it appears that the Department simply took the view that the people on the Maple Creek Band were not Treaty Indians and refused on that basis to provide assistance. [14] The basis for this new view by the Department appears to defy both historical fact and logic.

14. Between 1925 and 1944 little was done for the band. In that year the Superintendent of Indian Agencies, a Mr. Christianson and Sergeant Fleming of the Royal Canadian Mounted Police began efforts to acquire additional land for the band. [15] Their efforts were however unsuccessful.

15. Beginning in 1955, Department officials and a local member of Parliament, Irvin Studer, again requested that additional lands be provided to the band. [16] This resulted in the

addition of some lands by Order in Council passed on January 10, 1958. [17]

16. In the 1960s, the Department again reviewed the history of the band and properly concluded that the Nikaneet Band were Treaty Indians. In 1968 band members began to receive annuity payments.

17. Given the Department's refusal to maintain pay lists since 1882, accurate estimates of the band's population throughout the period are difficult. It is clear however that from a high 428 persons in 1881, the population of the band declined. The Department's pay lists for 1882 showed a significant decline to 300 persons. In October, 1908, Inspector Graham reported to Frank Pedley that the band consisted of approximately 89 persons, 40 at Medicine Hat, 30 camped at Maple Creek and 19 more travelling. [18] The population in October, 1914, was recorded as being 21 families totalling 81 persons. [19] A population figure of 80 persons is referred to in April, 1915. [20] By 1924 the population totalled approximately 60 persons, a number which appears to remain relatively constant until about 1944. [21] By 1957 the band had increased to 78 persons with further increases by 1963 to a total membership of 101 individuals of which 83 were ordinarily resident on the reserve.

18. A review of correspondence found in the Archives (R.G. 10, Volume 779, File 27140, of the Headquarter's files, Department of Indian Affairs) confirms that annuity payments

were not made nor were farm implements or supplies provided as was required by Treaty No. 4.

19. Until the passage of the Order in Council creating the reserve in August, 1913, the band did not appear to receive any government assistance whatsoever after cessation of the annuity payments in 1882.

20. Since the establishment of the reserve in 1913, a permanent population has been maintained. The reserve itself is however of poor quality and unable to sustain the present band membership on an economic basis. A description of the original reserve lands is set out in correspondence sent by Sergeant Fleming to Superintendent Christianson and in Christianson's reports to the Department. Excerpts from that correspondence include the following comments:

> "All of Sections 24 and 25 and the NE of 26, all in Township 9, Range 24, W 3rd Meridian, this land is covered by scrub poplar approximately 25% and has practically no grazing land thereon, and no hay land whatsoever. It has one good spring in the southwest corner of the southwest quarter of Section 24, which is located in the southwest corner of the reservation proper. The land is on the north slope of the Cypress Bench, is extremely rough, and rocky, and even if cleared is not fit for agriculture. It is located between two portions of the east block of the Forestry Reserve - (Birch Creek Ranger Station) and is only suitable for growing bush."
>
> "This band has no cattle whatsoever, for different reasons, these being that they have no range for them, also no hay land on which to put up feed for them, also that the reservation is such that they could not live on it the year round, having to go out to work to obtain a living, therefore the stock could have practically no attention."
>
> "I do not know who picked it out but I do know if they had looked all over western Canada they could not have found poorer land for a reserve than these Indians have."

> "The whole reservation as it now stands would no more than keep the ordinary white family yet we have sixty Indians trying to eke out an existence on it." [22].

21. In 1957, Regional Supervisor Jones wrote to the Department in the following terms:

> "...It is physically impossible for this band of Indians, numbering 78, to even exist on their present reserve of 1,440 acres comprised for the most part of barren hills, rocks and coolies, which affords little more sustenance than is required to graze a mere handful of livestock."
>
> "...At the present time, this band of Indians have nothing except an above-average amount of intestinal fortitude." [23].

22. The fact that the band suffered extreme hardship in obtaining access to facilities off the reserve is also evident in this report where it is noted that it was not until 1955 that the children of band members were admitted to local schools.

23. To this day, the band faces enormous problems in attempting to maintain its members. There are few jobs on the reserve. The land itself continues to be incapable of supporting economic activity to an extent which can benefit more than a very few band members. The vast majority of band members seeking employment are forced to look off the reserve. The sitution can only improve if the band obtains land which can be used as a basis for farming, ranching or other enterprises.

II BAND'S POSITION

Under the terms of the Native Claims Policy Canada has recognized "outstanding business between Indians and government which for the sake of justice, equity and prosperity now must be settled without further delay." Included within the policy under the heading "Lawful Obligation" is the following:

> "The government's policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding "lawful obligation," i.e. an obligation derived from the law on the part of the federal government.
>
> Lawful obligation may arise in any of the following circumstances:
>
> (i) The non-fulfillment of a Treaty or agreement between Indians and the Crown.
>
> (ii) The breach of an obligation arising out of the Indian Act or other statutes pertaining to Indians and the regulations thereunder." (page 20)

It is the band's view that its claim may be supported under both of the foregoing heads.

In addition, since adoption of the Native Claims Policy, the Supreme Court of Canada in decision of Guerin v. Her Majesty the Queen has recognized that the Crown owes a fiduciary or trust obligation to Indians and Indian bands. It is the band's view that the circumstances of this case disclose a breach of that duty, be it categorized as a fiduciary duty or trust obligation towards the band and its members.

It should be beyond dispute that the band led by Frontman or Foremost Man was entitled to the benefits of Treaty No. 4. The Department acknowledged his and the band's status following the signing of Treaty No. 4 by making annuity payments in 1881 and 1882.

The Department's conduct following that year cannot change the nature of its obligations. In fact, the reasons suggested by the Department over the years to justify its treatment of the band cannot be supported.

A further recognition of the band as a band entitled to benefits under both Treaty No. 4 and under the terms of the Indian Act is found in the establishment of the reserve by Order in Council in 1913. Having established the reserve it is difficult to understand the denial of further benefits to the band and its members.

The Department in the 1960s conducted a review of its records and has, since 1968, recognized the band as a separate band.

It is beyond question that the band was entitled to receive benefits due to a band under the Treaty and the Indian Act for the period from 1882 until payments were resumed in 1968.

On the basis of the facts outlined herein and other documentation within the Department's records, there would appear to be little question as to the validity of the band's claim and as to its right to receive compensation.

With respect to the band's claim based upon either breach of trust or breach of the Crown's fiduciary obligation, the Supreme Court of Canada in the Guerin decision has clearly held that in a legal sense the Crown may be held liable for damages should it breach the duty owed to the Indian people of Canada. In this instance, whether the obligation be categorized as one of a fiduciary obligation or one of trust, the actions of the Crown towards the band and its members would clearly suggest a breach of the obligation.

The Crown initially recognized its duty towards the band by making Treaty payments. Subsequent recognition of the band's status can be found in the repeated attempts over periods in excess of forty years to have the band relocated. Finally, even after establishment of the reserve near Maple Creek, it appears that the Department treated the band and its members as if they were not Treaty Indians for a period in excess of forty years. The actions of the Department towards the band can best be summarized in the language adopted by Dixon, J. (as he then was) in the Guerin decision where he described the actions of the Crown towards the Musqueam Indian Band as being unconscionable in nature.

While the Guerin decision is one dealing with a surrender of lands, the reasoning applied in that case can, nonetheless, be applied to the Nikaneet Band's claim. Under Treaty No. 4, the band gave up its claim to large tracts of land in return for certain promises. It is clear from a review of the history of the band that the government (for reasons which suited itself) did not fulfill the terms of the Treaty.

Further, the scheme set forth in the Indian Act places the Crown in a pre-eminent position to control the lives of Indians, their reserves, their property and their commerce. While the precise nature of the obligation of the Crown under the Indian

Act might be debated, the total abdication of the Department's responsibility as in this case must result in the validation of the band's claim if the Native Claims Policy is to have any meaning at all.

III CONCLUSIONS

It is submitted that the claim of the Nikaneet Band No. 160A is clearly outlined in this submission and in material in the possession of the Department. The Department has been aware of the nature and extent of the band's claim for many years.

The band therefore asks that the Minister take steps to validate its claim as quickly as possible. Although the band believes that the value of its claim is substantial, it recognizes that some additional work will be required prior to presenting a full and detailed claim for compensation. The band would ask that upon validation of the claim, access be granted for funding to more accurately determine the extent of the compensation which should be negotiated.

The band and its solicitors, Messrs. Olive, Waller, Zinkhan & Waller, are prepared to meet you and your officials at your convenience and to assist in any further research which may be required in order to validate the claim. An early response in this regard would be appreciated.

All of which is respectfully submitted on behalf of the band this ____ day of February, A.D. 1987.

NIKANEET BAND NO. 160A

Per: ______________________
Chief Gordon Oakes

Per: ______________________
John Oakes, Councillor

Per: ______________________
Larry Oakes, Councillor

V **FOOTNOTE REFERENCES**

1. Treaty No. 4, dated September 15, 1874, approved November 4, 1976, P.C. No. 1322; IAND Publication No. -OS-0572-000-EE-A-1.

2. Ibed, See also Memorandum signed by A. MacKenzie seeking Privy Council approval of the Treaty; IAND Publication No. -OS-0572-000-EE-A-1.

3. Departmental Annuity Pay Lists for 1881 and 1882 recording payments made at Fort Walsh entitled "Foremost Man Band" and "Front Man's Band."

4. R.G. 10, Vol. 3652, Files 8589-1 & 2, Vol. 3691, File 13893.

5. Ottawa, Public Archives, Record Group 20, Indian Affairs Telex, Vol. 3757, File 31,333, letter Allen to Asst. Commissioner Galt, Mar. 31, 1881; File 31397, letter Allen to Dewdney, July 5, 1881, letter Dewdney to Superintendent. General of Indian Affairs, August 18, 1883, letter - Inspector Wadsworth to Dewdney August 14, 1884, letter - Col. Irvin to Comm., August 27, 1884.

6. R.G. 10, Box 390, 858, File 27140 Dewdney to Superintendent General, February 15, 1886.

7. R.G. 10, Vol. 7779, File 27410, W. G. Graham, Inspector of Indian Agencies to F. Pedley, Deputy Superintendent General, Indian Affairs, October 3, 1908.

8. See, for example, footnote 9, supra, letters from George Gunn to J. A. MacDonald, February 21, 1887, letter from J. J. English, local rancher, to J. F. Sanderson dated May 18, 1897; Petition of J. F. Sanderson to the Minister dated May 25, 1897. Other correspondence in R.G. 10, Vo.. 7779, File 27410.

9. Petition of February 1896 signed by local residents and presented to the Minister.

10. R.G. 10, Box 390, 850, File 27140, Commissioner Laird to the Sec. Deputy of Indian Affairs, May 3, 1906.

11. Ibid, Campbell to Deputy Superintendent General, May 10, 1906.

12. F. Pedley, Deputy Superintendent General to W. M. Graham, Inspector of Indian Agencies, May 7. 1908.

13. Order in Council dated August 2, 1913.

14. The source of this view appears to have begun with a letter from Agent Murison to Commissioner Graham dated January 12, 1925.

15. Christianson to Indian Affairs, June 16 and August 3, 1944; Sgt. Fleming to Christianson, July 14, 1944.

16. See , for example, letter from Regional Supervisor to Indian Affairs, Ottawa dated September 19, 1955; letter from Supervisor Jones to Indian Affairs, Ottawa, January 31, 1957.

17. Order in Council, January 10, 1958.

18. R.G. 10, Vol. 7779, File 27140, Headquarters File, letter, Inspector W. M. Graham to Frank Pedley, Deputy Superintendent General Indian Affairs, October 3, 1908.

19. Ibed, letter from "Stoney Indian" to Department of Indian Affairs, Ottawa dated October 23, 1914.

20. Ibed, letter from P.M.O. Turner, Medicine Hat, to Department of Indian Affairs, Ottawa, August 5, 1915.

21. Ibid, letter, N. McTaggart, M.P., Gull Lake, Sask. to Department of Indian Affairs, August 4, 1924.

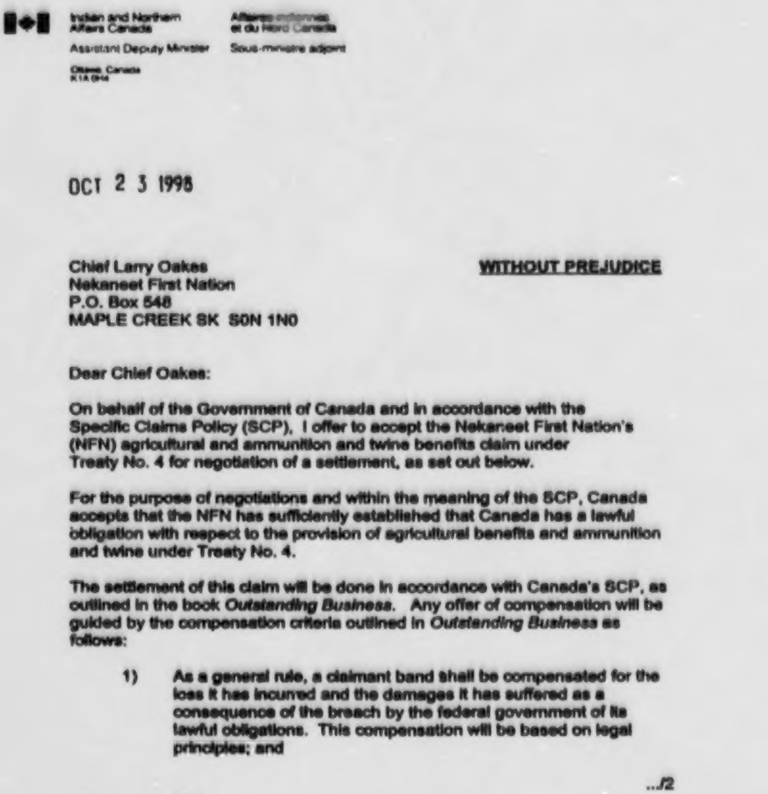
22. Ibid, Sgt. Fleming, Maple Creek R.C.M.P. to Superintendent Christianson, Regina, July 14, 1944.

23. Ibid, E. S. Jones, Reg. Supervisor Indian Agencies to Indian Affairs Branch, Ottawa, January 31, 1957.

24. Ibid, E. S. Jones, Reg. Supervisor Indian Agencies to Indian Affairs Branch, Ottawa, January 31, 1957.

APPENDIX B

GOVERNMENT OF CANADA'S OFFER TO ACCEPT CLAIM



Indian and Northern Affairs Canada
Affaires indiennes et du Nord Canada

Assistant Deputy Minister
Sous-ministre adjoint

Ottawa, Canada
K1A 0H4

OCT 2 3 1998

Chief Larry Oakes
Nekaneet First Nation
P.O. Box 548
MAPLE CREEK SK S0N 1N0

WITHOUT PREJUDICE

Dear Chief Oakes:

On behalf of the Government of Canada and in accordance with the Specific Claims Policy (SCP), I offer to accept the Nekaneet First Nation's (NFN) agricultural and ammunition and twine benefits claim under Treaty No. 4 for negotiation of a settlement, as set out below.

For the purpose of negotiations and within the meaning of the SCP, Canada accepts that the NFN has sufficiently established that Canada has a lawful obligation with respect to the provision of agricultural benefits and ammunition and twine under Treaty No. 4.

The settlement of this claim will be done in accordance with Canada's SCP, as outlined in the book *Outstanding Business*. Any offer of compensation will be guided by the compensation criteria outlined in *Outstanding Business* as follows:

1) As a general rule, a claimant band shall be compensated for the loss it has incurred and the damages it has suffered as a consequence of the breach by the federal government of its lawful obligations. This compensation will be based on legal principles; and

.../2

Canada

2) Any compensation paid in respect to a claim shall take into account any previous expenditure already paid to the claimant in respect of the same claim.

The NFN claim is the first agricultural benefits claim Canada has accepted under Treaty No. 4, and is the first historical claim for agricultural benefits accepted by Canada. In order to better prepare for negotiation, Canada must conduct further work on compensation requirements. We regret this further delay, but hope to be in a position to initiate the negotiation process early next year.

The steps in the negotiation process which will be followed include: negotiations toward a settlement agreement; drafting of a settlement agreement; concluding the agreement; ratifying the agreement; and finally, implementation of the agreement.

Throughout the claims process, Canada's files, including all documents submitted to Canada concerning the claim, are subject to Access to Information and Privacy legislation in effect.

All negotiations are conducted on a "without prejudice" basis. Canada and the NFN acknowledge that all communications, whether oral, written, formal or informal, are made with the intention of encouraging settlement of the dispute between the parties only, and are not intended to constitute admissions by any party.

The acceptance of the claim for negotiations is not to be interpreted as an admission of liability or fact by Canada. In the event that settlement cannot be reached and litigation ensues, Canada reserves the right to plead all defences available to it, including limitation periods, laches and lack of admissible evidence.

In the event that a final settlement is reached, the settlement agreement must contain a release from your First Nation ensuring that this claim cannot be reopened. As part of the settlement, Canada will also require an indemnity from your First Nation.

.../3

If you have any questions or concerns which you wish to raise prior to the initiation of negotiations, please contact Anne-Marie Robinson, Director, Policy and Research at (819) 953-1987.

Yours sincerely,

Warren Johnson
A/Assistant Deputy Minister
Claims and Indian Government

c.c.: Thomas Waller
Jake Tootoosis
Bill Bernhardt
Audrey Stewart

INDIAN CLAIMS COMMISSION

MOOSE DEER POINT FIRST NATION INQUIRY
POTTAWATOMI RIGHTS

PANEL

Commissioner Carole T. Corcoran
Commissioner Roger J. Augustine

COUNSEL

For the Moose Deer Point First Nation
Gary Nelson

For the Government of Canada
Perry Robinson

To the Indian Claims Commission
David E. Osborn, QC / Ralph Keesickquayash / Tom Gould

MARCH 1999

CONTENTS

PART I ***INTRODUCTION*** 139
Procedural Background to the Inquiry 139
  Map 1 Moose Point Indian Reserve 79 140
Mandate of the Indian Claims Commission 145

PART II ***HISTORICAL CIRCUMSTANCES*** 147
Preamble 147
  Map 2 Traditional Pottawatomi Territory and Modern Location 148
Pottawatomi Relations with Europeans to the War of 1812 150
  The French Era, 1600s to 1763 150
  Early British Indian Policy and Practice, 1750s and 1760s 151
  The American Revolution and the Struggle for Homelands, 1775-94 153
  Offer of Asylum in Canada, 1795 155
  Councils at Amherstburg, 1808 and 1810 155
  The War of 1812 156
Situation after the War of 1812 158
  Presents 158
  American Treaties and Removal, 1830s 159
  The Policy of Civilization and Christianization, 1830-35 160
  Map 3 Claim Area in Southwestern Ontario 162
  Head's Plan for the Indians of Upper Canada, 1836 164
  Chief Superintendent Jarvis's Address, 1837 170
  Difficulties with Head's Proposals 175
Migration to Canada and the Aftermath 186
  Pottawatomi Immigration/Migration from 1837 186
  Moose Deer Point Settlement 190
  Robinson-Huron Treaty, 1850, and Williams Treaty, 1923 192
  Pottawatomi Approach Other Bands, 1877 193
  Chief Paudash and the Historical Societies, 1904 199
  Campaign for Inclusion in Christian Island Band, 1911-16 200
  Land Base Acquired at Moose Deer Point, 1917 205
  Request to Adhere to Robinson Treaties, 1932 211

PART III ***ISSUES*** 213

PART IV ***ANALYSIS*** 214
Issue 1: Promises to the Indians 214
Issue 2: Nature and Scope of the Crown's Promises 215
  Did the Promises Constitute a Treaty 216
    Principles of Treaty Interpretation 216
    Capacity to Enter into Treaty 223
    Solemnity 236
    Mutuality 242
    Intention 246
  The Substance of the Promises 253
    Principles of Treaty Interpretation 253
    Presents 257
    Land and Protection 268
      Land 276
      Protection 282
    Equality 289
Issue 3: LAWFUL OBLIGATION 292

PART V ***RECOMMENDATIONS*** 297

APPENDIX 299
A Moose Deer Point First Nation Inquiry – Pottawatomi Rights 299

PART I

INTRODUCTION

The members of the Moose Deer Point First Nation (the First Nation) are Anishnabe people of predominantly Pottawatomi and Ottawa (Odawa) heritage who are extensively intermarried with the Chippewa (Ojibwa).[1] Their one reserve, Moose Point Indian Reserve (IR) 79, consists of three small parcels of land on a point on the east side of Lake Huron's Georgian Bay (see map 1 on page 140).[2] After 1763, the Pottawatomi ancestors of the First Nation fought as allies of the British to defend their home territory around Lake Michigan. During the War of 1812, they again fought with the British to defend Upper Canada from American incursions, as they did during the Rebellions of 1837-38. Of central importance to the present claim is the fact that many of Britain's Indian allies living in the United States relocated permanently to Canadian territory during the 1830s, relying, according to the First Nation, on promises made to them by the Crown's representatives.

PROCEDURAL BACKGROUND TO THE INQUIRY

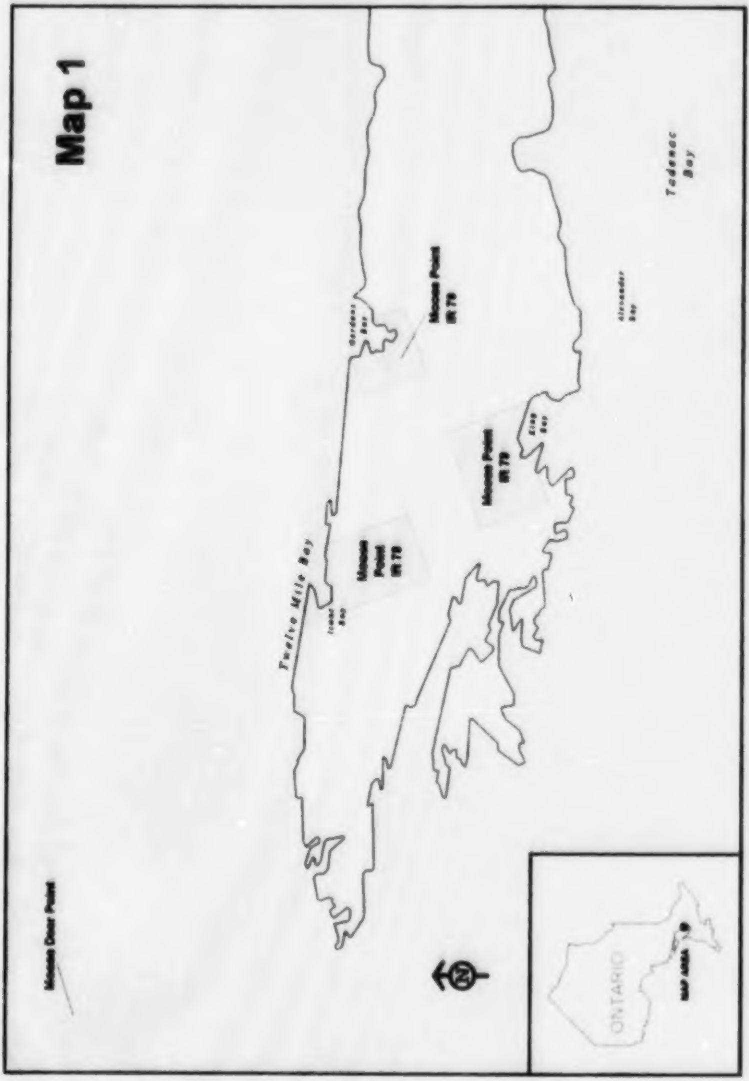
This inquiry was convened to consider the First Nation's claim that Canada owes it an outstanding lawful obligation based on these promises alleged to have been made by the Crown to its allies, including the ancestors of Moose Deer Point First Nation. The inquiry therefore required the Indian Claims Commission (the Commission) to examine the history of the Pottawatomi Nation, to determine what types of promises, if any, were made to the First Nation, and to determine the legal effect of any promises made. As jointly framed by the parties, the issues under consideration were the following:

- Were promises made by the Crown to its allies, including ancestors of the Moose Deer Point First Nation?

---

[1] Written Submission on Behalf of Moose Deer Point First Nation, August 1, 1997, p. 2.

[2] The main village on the reserve has been known variously over the years as Moose Point, Moose Deer Point, Partridge Bay, King's Bay, or Alexander Bay.


Map 1
Moose Deer Point
Twelve Mile Bay
Moose Point IR 79
Gordons Bay
Moose Point IR 79
Moose Point IR 79
Alexander Bay
Tadenac Bay
ONTARIO
MAP AREA

Prepared by Public History Inc. Cartography by G.I.S. Mapping

- If promises were made by the Crown to its allies, including ancestors of the Moose Deer Point First Nation, what were the nature and the scope of the promises?
- Does the Crown have an outstanding lawful obligation to the Moose Deer Point First Nation?

This claim for recognition of Pottawatomi rights in Canada was first submitted to the Specific Claims Branch of the Department of Indian Affairs and Northern Development (DIAND) by the Moose Deer Point First Nation in April 1995. At that time, the First Nation contended that "[t]he Crown's obligation arose out of [its] invitation . . . to its allies to settle permanently in Upper Canada, and to continue to enjoy the goods that had been given in furtherance of the treaties of military alliance"; the obligation also arose out of the Crown's offer of protection to its Indian allies.[3] Moose Deer Point submitted that, as a result of these promises, it became and continues to be entitled to "rights of use and occupation in the traditional territory of the Chippewas and Ojibwas of Georgian Bay" as well as the other unsurrendered "Pottawatomi rights" of annual presents and ongoing protection. The First Nation further submitted that its use and occupation of the Georgian Bay territory have been "impaired" without compensation by the development and settlement of the land without reference to, or protection of, the rights of the First Nation.[4]

Canada delivered its answer to the First Nation on August 18, 1995. At that time, Judy Glover, the Acting Director of Specific Claims East/Central, took the "preliminary position" that "the claim fails to demonstrate any outstanding lawful obligation":

> Although there are gaps and weaknesses in the historical record, we are prepared to accept that the Moose Deer Point First Nation is most likely descended from Chief Ogemahwahjwon,[5] a Pottawatomi who migrated to Canada from the United States in the mid-1830s. It appears that this chief and his followers were allies of the British during the War of 1812. There is some evidence which indicates that the British

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[3] Berger & Nelson, Barristers & Solicitors, "Re: Moose Deer Point First Nation Specific Claim," April 6, 1995 (ICC Documents, p. 393).

[4] Berger & Nelson, Barristers & Solicitors, "Re: Moose Deer Point First Nation Specific Claim," April 6, 1995 (ICC Documents, pp. 394-95).

[5] The First Nation refers to this former Chief as Ogemawahj, but the name has received a number of spellings over the years, including Ogemahwahjwon, Ogeemawatch, Ogimawadj, Ogemahwaht, Ogemahwahjwan, and Ogemahwadj. Ogemawahj also appears to have been referred to as Quasing. For purposes of consistency in this report, the Commission will use the form adopted by the First Nation: Ogemawahj.

> government promised its Indian allies that if they moved to Canada they would be allowed to settle here and that they would receive the same benefits as other Indians in Canada.
>
> In our view, it is not necessary for the purposes of this claim to determine whether any promises that may have been made by the British are binding on the Crown. Any such promises were fulfilled by Canada's provision of land [IR 79] to the First Nation in 1917. Since that time, the First Nation has been treated in the same way as other bands.
>
> It is also our preliminary position that the Moose Deer Point First Nation has no aboriginal rights over the lands it now occupies, as these are not its traditional lands. There is no evidence that any general rights of use and occupation of land were granted to the First Nation in the promises which may have been made to it at the time it migrated to Canada, nor that any such rights have accrued to the First Nation since that time.
>
> For these reasons, we cannot accept the First Nation's claim for negotiation.[6]

Nevertheless, Glover also informed the First Nation that it had the option of going to the Indian Claims Commission "without submitting additional evidence or legal argument," using her August 18, 1995, letter as evidence that Canada would not accept the claim.[7]

On November 23, 1995, Chief Edward Williams forwarded Glover's letter to the Commission together with the April 6, 1995, claim submission and Band Council Resolution 1995-96-14 requesting that the Commission conduct an inquiry into Canada's rejection of the claim.[8] The Commission immediately started collecting relevant historical documents from the parties, and convened a planning conference in Ottawa on August 30, 1996. At the planning conference, the parties concurred that expert evidence would be unnecessary and, given that Chief Williams did not believe that a community session would be of assistance, agreed to proceed without oral testimony from the First Nation's elders. By October 3, 1996, the parties and the Commission had further agreed that they could rely solely on written submissions and could thus dispense with oral submissions by counsel.

In succeeding months, the parties and the Commission worked together to finalize and clarify the documentary record, and eventually established August 8, 1997, as the date for filing written submissions. The Commission ultimately received written submissions from the First Nation on August 1, 1997, and from Canada on August 7, 1997. Before written rebuttal submissions could be exchanged, however, counsel for Canada corresponded with the Commission on September 5, 1997, to outline the following concerns raised by the First Nation's written submission:

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[6] Judy Glover, Acting Director, Specific Claims East/Central, Indian and Northern Affairs Canada, to Chief Laird Hendrick, Moose Deer Point First Nation, August 18, 1995, p. 2.

[7] Judy Glover, Acting Director, Specific Claims East/Central, Indian and Northern Affairs Canada, to Chief Laird Hendrick, Moose Deer Point First Nation, August 18, 1995, p. 2.

[8] Chief Edward Williams, Moose Deer Point First Nation, to Indian Claims Commission, November 23, 1995.

- According to Canada, the First Nation's allegation that the Crown had "failed to set aside sufficient lands for the use and benefit of the Moose Deer Point First Nation" was new and quite different from the allegation that it had been "deprived of the use and occupation of land," and therefore should not be considered by the Commission since it had not been raised in the April 6, 1995, submission to Specific Claims or in the August 30, 1996, planning conference.
- Canada argued that certain evidence relied on by the First Nation was not supported by the sources cited in its submission or merely represented the opinions of researchers working on the First Nation's behalf, making it difficult for Canada to check and substantiate the First Nation's conclusions.
- After agreeing to dispense with oral testimony from elders, the First Nation in its written submission relied on statements taken from United Anishnaabeg elders, including elders from the Moose Deer Point First Nation, concerning treaties such as the 1923 Williams Treaty, a process that did not provide Canada with an opportunity to check these statements against corroborating evidence or to argue regarding the weight that should be attached to them.

Canada contended that the Commission should have no regard for the new allegation of liability or the unsupported evidence, and that the elders' statements should likewise not be considered unless there would be an opportunity to question the elders or to obtain full particulars of their statements, including transcripts, if available.[9]

Counsel for the First Nation responded on October 29, 1997, after receiving information regarding the source of the elders' statements. He argued that the Crown's failure to set aside sufficient land was subsumed in its obligation to protect the First Nation in its use and occupation of lands from European encroachment, an obligation that has typically been resolved by setting aside lands for the sole use and benefit of a band. In denying that this allegation constituted a new claim, he noted that Canada had responded to the claim by arguing that any promises made to the First Nation had been fulfilled by Canada's provision of IR 79 in 1917. He also provided a point-by-point response to Canada's challenge to the conclusions drawn by the First Nation's researchers, and noted that Canada had been in possession of the elders' statements for over a year. He added that the interviewed elders were no longer living.[10]

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[9] Laurie Klee, Counsel, DIAND Legal Services, Specific Claims, Department of Justice, to Ralph Keesickquayash, Associate Legal Counsel, Indian Claims Commission, September 5, 1997.

After a conference call among counsel and the Commissioners on November 12, 1997, the Commission informed the parties on January 28 and February 4, 1998, of its decision that the "new" allegation regarding insufficient lands being set apart for the use and benefit of the First Nation was properly subsumed within the issues as framed at the August 30, 1996, planning conference. As such, the Commission intended to deal with the issue in its final report.[11] The Commission invited the parties to make oral submissions, and ultimately they did so on April 8, 1998, at the Moose Deer Point Community Hall, following the delivery of written rebuttal submissions by Canada on April 2, 1998, and by the First Nation on April 3, 1998. The documentary evidence, written submissions, transcript from the oral submissions, and the balance of the record in this inquiry are referenced in Appendix A to this report.

This claim turns primarily on historical documents from the 1830s. In particular, the First Nation contends that an August 4, 1837, address by the Chief Superintendent of Indian Affairs amounted to a treaty applicable to the present circumstances of Moose Deer Point First Nation. However, the First Nation's 1995 submission to the Specific Claims Branch, its 1997 written submission to the Commission, and the accompanying documents and exhibits cover a huge swath of history ranging from the late 1600s to the 1930s. As will be seen in the following section of this report, the Commissioners have been asked to consider a span of time covering some 250 years. Against this historical backdrop, the Moose Deer Point First Nation argues that it has not been provided with the land and presents promised to it by Britain, that it has not been treated equally with other bands in Ontario, and that it has not been protected in its use and occupation of reserve lands and other lands for traditional purposes.[12]

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[10] Gary A. Nelson, Berger & Nelson, Barristers & Solicitors, to Ralph Keesickquayash, Associate Legal Counsel, Indian Claims Commission, October 29, 1997.

[11] Ralph J. Keesickquayash, Associate Legal Counsel, Indian Claims Commission, to Gary Nelson, Berger & Nelson, Barristers & Solicitors, and Laurie Klee, Counsel, DIAND Legal Services, Specific Claims, Department of Justice, January 28, 1998; Ralph J. Keesickquayash, Associate Legal Counsel, Indian Claims Commission, to Gary Nelson, Berger & Nelson, Barristers & Solicitors, and Laurie Klee, Counsel, DIAND Legal Services, Specific Claims, Department of Justice, February 4, 1998.

MANDATE OF THE INDIAN CLAIMS COMMISSION

The Commission's mandate to conduct inquiries pursuant to the *Inquiries Act* is set out in a commission issued on September 1, 1992. The Order in Council directs:

> that our Commissioners on the basis of Canada's Specific Claims Policy . . . by considering only those matters at issue when the dispute was initially submitted to the Commission, inquire into and report on:
>
> a) whether a claimant has a valid claim for negotiation under the Policy where that claim has already been rejected by the Minister; and
>
> b) which compensation criteria apply in negotiation of a settlement, where a claimant disagrees with the Minister's determination of the applicable criteria.[13]

The Specific Claims Policy is set forth in a 1982 booklet published by the Department of Indian Affairs and Northern Development entitled *Outstanding Business: A Native Claims Policy – Specific Claims.*[14] In considering a specific claim submitted by a First Nation to Canada, the Commission must assess whether Canada owes an outstanding lawful obligation to the First Nation in accordance with the guidelines provided in *Outstanding Business*:

> The government's policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding "lawful obligation," i.e., an obligation derived from the law on the part of the federal government.
>
> A lawful obligation may arise in any of the following circumstances:
>
> i) The non-fulfillment of a treaty or agreement between Indians and the Crown.
>
> ii) A breach of an obligation arising out of the *Indian Act* or other statutes pertaining to Indians and the regulations thereunder.
>
> iii) A breach of an obligation arising out of government administration of Indian funds or other assets.

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[12] Written Submission on Behalf of Moose Deer Point First Nation, August 1, 1997, pp. 87-90.

[13] Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730, July 27, 1992, amending the Commission issued to Chief Commissioner Harry S. LaForme on August 12, 1991, pursuant to Order in Council PC 1991-1329, July 15, 1991 (Consolidated Terms of Reference).

[14] DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), reprinted in [1994] 1 ICCP 171-85 (hereafter DIAND, *Outstanding Business*).

iv) An illegal disposition of Indian land.[15]

It should also be noted that, when the original mandate of the Commission was still under discussion, Tom Siddon, at that time the Minister of Indian Affairs and Northern Development, wrote to then National Chief Ovide Mercredi of the Assembly of First Nations setting out the basis for what the Commission has previously referred to as its "supplementary mandate":

> If, in carrying out its review, the Commission concludes that the policy was implemented correctly but the outcome is nonetheless unfair, I would again welcome its recommendations on how to proceed.[16]

The purpose of this inquiry is to inquire into and report on whether, on the basis of the Specific Claims Policy, Canada owes an outstanding lawful obligation to the Moose Deer Point First Nation.

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[15] DIAND, *Outstanding Business*, 20.

[16] Hon. Tom Siddon, Minister of Indian Affairs and Northern Development, to Ovide Mercredi, National Chief, Assembly of First Nations, November 22, 1991.

PART II

HISTORICAL CIRCUMSTANCES

PREAMBLE

As we have already seen, the claim of the Moose Deer Point First Nation is rooted in the history of its Pottawatomi ancestors, whose traditional territory was wide-ranging. That territory, centred on Lake Michigan, included much of Wisconsin and Michigan as well as the northern portions of Illinois and Indiana (see map 2 on page 148). The Pottawatomi maintained close cultural and political ties with the Chippewa and Ottawa, whose languages are also within the Algonquian (Algonkian) language family. The Three Fires Confederacy, although not the focus of this claim, has been and is associated with these three nations.[17]

Exactly how the First Nation's ancestors happened to settle at Moose Deer Point is not easy to establish. When they first relocated to Canadian territory, some lived with other Indian bands at Coldwater,[18] Beausoleil Island, Christian Island, and Parry Island[19] before leaving to take up residence at Moose Deer Point. However, unlike these neighbouring bands, the Moose Deer Point First Nation is a non-treaty band. No known representatives of the First Nation entered into the Robinson-Huron Treaty of 1850 or the Williams Treaty of 1923, although both treaties dealt with lands in the vicinity of Moose Deer Point. Various efforts by the First Nation to adhere to treaty have to date proven unsuccessful.

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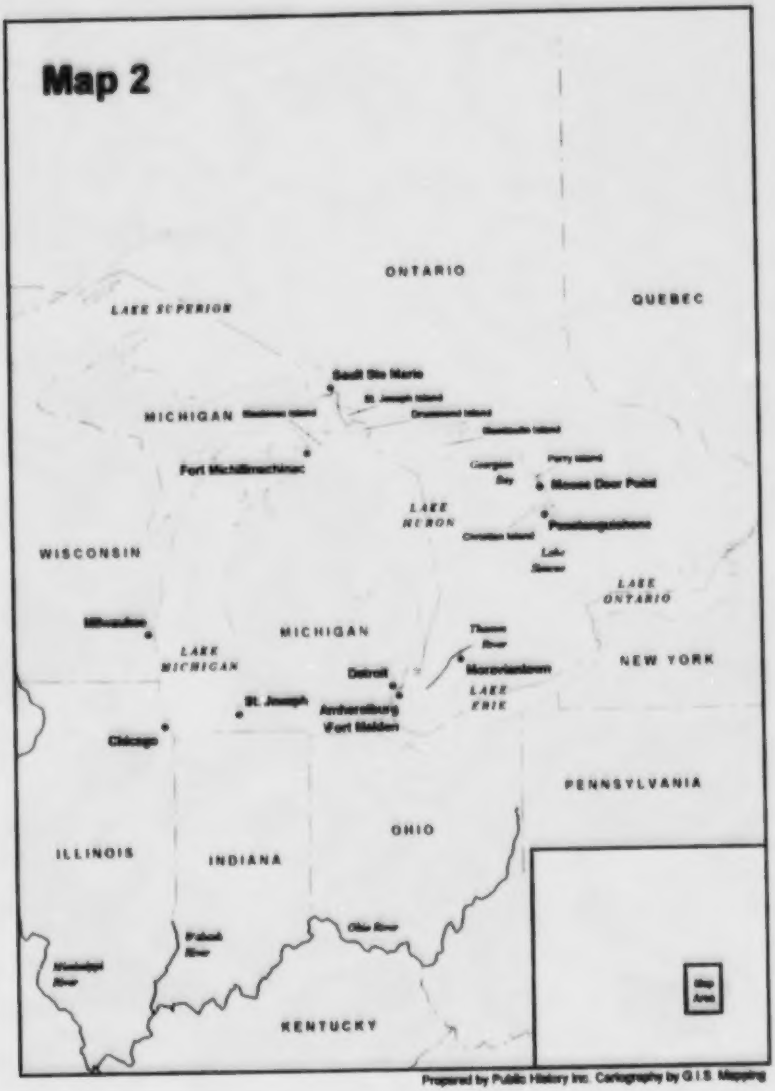
[17] R. David Edmunds, "Potawatomi," in *Encyclopedia of North American Indians*, ed. Frederic E. Hoxie (New York: Houghton Mifflin, 1996), 506; James A. Clifton, "Potawatomi," in *Handbook of North American Indians*, Volume 15: *Northeast*, ed. Bruce G. Trigger (Washington: Smithsonian Institution, 1978), 725 [hereafter Clifton, "Potawatomi," in *Handbook of North American Indian*, vol. 15] (ICC Exhibit 12); Franz M. Koennecke, "The Anishinabek of Moose Deer Point Reserve No. 79: A Historical View," June 30, 1983 (ICC Exhibit 9, pp. 9-10).

[18] C. Wesley-Esquimaux, "Moose Deer Point: Robinson Huron Treaty Adhesion, Historical Background and Recommendations," March 1988 (ICC Exhibit 5, p. 7).

[19] C. Wesley-Esquimaux, "Moose Deer Point: Robinson Huron Treaty Adhesion, Historical Background and Recommendations," March 1988 (ICC Exhibit 5, p. 9).

Map 2


ONTARIO
QUEBEC
LAKE SUPERIOR
Sault Ste Marie
St. Joseph Island
MICHIGAN
Mackinac Island
Drummond Island
Manitoulin Island
Fort Michilimackinac
Georgian Bay
Parry Island
Moose Deer Point
LAKE HURON
Penetanguishene
Christian Island
Lake Simcoe
LAKE ONTARIO
WISCONSIN
Milwaukee
LAKE MICHIGAN
MICHIGAN
Thames River
Moraviantown
NEW YORK
Detroit
LAKE ERIE
St. Joseph
Amherstburg
Fort Malden
Chicago
PENNSYLVANIA
OHIO
ILLINOIS
INDIANA
Ohio River
Wabash River
Mississippi River
KENTUCKY
Map Area

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Indian Affairs' population figures for the Moose Deer Point First Nation as of December 31, 1997, indicated a total membership of 375, of whom 243 lived off-reserve, 123 lived on the First Nation's IR 79, 8 lived on the reserves of other bands, and the remaining individual lived on Crown land.[20] IR 79, established "for the Pottawatomi of King's Bay" in 1917,[21] consists of three parcels of land that originally amounted to 250.5 hectares (or 619 acres) located roughly 30 kilometres south of Parry Sound and 50 kilometres west of Bracebridge, Ontario.[22]

In this claim, the Moose Deer Point First Nation alleges that the reserve set aside for it in 1917 is insufficient and that economic assistance to the First Nation has been inadequate. In seeking treatment similar to that received by its neighbours, the First Nation also asserts that the Crown treated it as a marginal group and failed to protect it.[23] Moose Deer Point member Art Sandy expressed it this way:

> We were allies of the Crown and that's how we came into Canada in the first place. They wouldn't help us keep our own lands in the States so they told us we could come here and we'd be treated the same as other Indians. Well, we got these three little pieces of land but we haven't been treated very well. The Pottawatomi that live on other Reserves got treated the same as the other Indians but those like us never really got the same deal. We don't even have a Treaty to help us out. That's not fair.[24]

Mr Sandy maintained that his people did not understand what was happening when the reserve was set up.[25] Rather than getting the land the First Nation needed, "we got these three sections – where the people lived – but we didn't get the other parts we used in between or out into the Bay."[26]

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[20] DIAND, Corporate Information Management Directorate.

[21] C. Wesley-Esquimaux, "Moose Deer Point: Robinson Huron Treaty Adhesion, Historical Background and Recommendations," March 1988 (ICC Exhibit 5, p. 18). Footnote 34 refers to the following documents from Indian Affairs file 475/30-10-79: "J.D. MacLean[, Assistant Deputy and Secretary, Department of Indian Affairs,] to Albert Grigg, Deputy Minister [of] Lands and Forests, [Ontario Department of Lands, Forests and Mines,] November 21, 1917; *Grigg to MacLean, April 12, 1917*; *Grigg to MacLean, December 12, 1917*; Grigg to W.R. White, [Surveyor, Survey Branch,] Department of Indian Affairs, October 20, 1917; MacLean to Grigg, December 15, 1917; *MacLean to Grigg, January 11, 1918*; *MacLean to [C.J.] Picotte, Indian Agent, Penetanguishene, February 18, 1918*." The four italicized documents were not included within the documentary record in this inquiry.

[22] Canada, *Schedule of Indian Bands, Reserves and Settlements* (Ottawa: DIAND, December 1992), 26.

[23] Written Submission on Behalf of the Moose Deer Point First Nation, August 1, 1997, pp. 89-90.

[24] Art Sandy, Moose Deer Point First Nation, in Cynthia C. Wesley-Esquimaux and Dr. I.V.B. Johnson, "United Anishnaabeg Elders: The Treaties Revisited," April 1996, p. 96 (ICC Documents, p. 419).

[25] Art Sandy, Moose Deer Point First Nation, in Cynthia C. Wesley-Esquimaux and Dr I.V.B. Johnson, "United Anishnaabeg Elders: The Treaties Revisited," April 1996, pp. 96-97 (ICC Documents, pp. 418-19).

[26] Art Sandy, Moose Deer Point First Nation, in Cynthia C. Wesley-Esquimaux and Dr I.V.B. Johnson, "United Anishnaabeg Elders: The Treaties Revisited," April 1996, pp. 96-97 (ICC Documents, pp. 418-19).

As mentioned, the historical documentation supplied to the Indian Claims Commission in connection with this claim covers a 250-year period. Unfortunately, the thread linking the members of the Moose Deer Point First Nation to their American ancestors disappears into the fabric of the broader explanation of why so many Pottawatomi eventually moved to Canadian territory. Finding a direct genealogical link between the First Nation and Indians who were present to hear the August 4, 1837, address by the Chief Superintendent of Indian Affairs is less of a concern than otherwise might have been the case, however, since Canada concedes that the 1837 pronouncement was intended for the Pottawatomi ancestors of the Moose Deer Point First Nation. Nor is there any dispute over the fact that, once certain Pottawatomi relocated to Canadian soil, they faced an ill-defined relationship with respect to other bands, treaties, Indian moneys, and lands reserved for Indians.

POTTAWATOMI RELATIONS WITH EUROPEANS TO THE WAR OF 1812

The French Era, 1600s to 1763

In the 1600s, the exchange of presents between First Nations and European traders was already a recognized diplomatic practice, with well-established roots in the traditions of the First Nations. What the Indians had to exchange were food, furs, knowledge of the country, the land itself, and protection. For the Europeans who were competing for dominance in North America, "presents had become decisive in Indian diplomacy, for Indian allies provided the critical margin of victory in time of war, and the necessary precondition to prosperity in peacetime."[27]

Throughout the first half of the 18th century, the Pottawatomi generally allied with the French and the Huron in wars against the Iroquois and the British. In the 1750s, during the war between France and Britain for empire, the Pottawatomi fought their Indian enemies and made war on English settlements.[28] After France had been defeated in North America in 1760 and the British had assumed responsibility for protecting France's Indian allies in their lands, the Pottawatomi allied with the British.[29] When France ceded New

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[27] James A. Clifton, "'Visiting Indians' in Canada," manuscript for Parks Canada booklet, 1979 (ICC Exhibit 11, p. 13).

[28] J. Norman Heard, "Potawatomi Indians," in *Handbook of the American Frontier: Four Centuries of Indian-White Relationships*, Volume II: *The Northeastern Woodlands* (Metuchen, NJ: Scarecrow Press, 1990), 300; Clifton, "Potawatomi," in *Handbook of North American Indians*, vol. 15, 727-28, 730-31 (ICC Exhibit 12).

[29] Paul Williams, "'The King's Bounty': A Short History of the Distribution of Indian Presents, 1764-1858," DIAND, Claims and Historical Research Centre, Item I-136 (ICC Exhibit 10, p. 1).

France and all of its territory east of the Mississippi to Britain by the Treaty of Paris in 1763, the Pottawatomi's war against intruding settlers south of the Great Lakes did not end. Throughout Pontiac's Rebellion in 1763, the subsequent struggle for the Ohio Valley, and the War of 1812, the Pottawatomi continued to resist the encroachment of American settlers on their traditional territory.

Early British Indian Policy and Practice, 1750s and 1760s

The formal beginning of the British Indian Department under Crown prerogative began with the appointment in 1756 of Sir William Johnson to the position of "Colonel, Agent and Sole Superintendent of the Affairs of the Six Nations, and other Northern Indians."[30] The Articles of Capitulation surrendering Montreal and Quebec provided that "the Savages or Indian allies of His Most Christian Majesty [France] shall be maintained in the lands they inhabit, if they choose to reside there; they shall not be molested on any pretence whatever. . . ."[31] Johnson observed that, as this protection afforded the British "a connection with many [Indian] Nations, with whom before we had no intercourse . . . we should cultivate a good understanding with them, for the security of, and the safety of the public."[32] In this vein, Britain set out to recruit Pottawatomi and other Indian allies through the delivery of annual presents.

Once France had been defeated in North America, the commander of British forces there, Sir Jeffery Amherst, ordered an end to the giving of presents both to eliminate the expense and to guard against any gaining of Indian friendship through what he termed "bribery."[33] This action, taken in an atmosphere of uncertainty exacerbated by the activities of unscrupulous traders and speculators, helped bring about "Pontiac's Rebellion" during the summer of 1763. "Pontiac's War," as it is also called, was a coordinated series of Indian attacks that brought down eight British forts and resulted in the deaths of 2000 settlers.[34]

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[30] Robert S. Allen, *His Majesty's Indian Allies: British Indian Policy in the Defence of Canada, 1774-1815* (Toronto: Dundurn Press, 1992) (ICC Exhibit 4, pp. 27-28) [hereafter Allen, *His Majesty's Indian Allies*]. Johnson's successful defence against the French at Lake George (New York) in 1755 earned him the title of Sir William Johnson.

[31] Allen, *His Majesty's Indian Allies* (ICC Exhibit 4, pp. 31-32).

[32] Allen, *His Majesty's Indian Allies* (ICC Exhibit 4, p. 30).

[33] Allen, *His Majesty's Indian Allies* (ICC Exhibit 4, p. 32). Amherst thought a more secure way to keep the tribes quiet was to deprive them of supplies, shot, and powder. Eager to "reduce" the disaffected tribes, Amherst even went so far as to inquire about infecting them with smallpox. British Library, Add. Mss. 21364 (Bouquet Papers), Sir Jeffery Amherst to Colonel Henry Bouquet, no date. Bouquet, the commander of the western posts, replied to Amherst, agreeing to the suggestion. British Library, Add. Mss. 21364 (Bouquet Papers), Colonel Henry Bouquet to Sir Jeffery Amherst, July 13, 1763; Carl Waldman, *Atlas of the North American Indian* (New York: Facts on File, 1985), 106.

The *Royal Proclamation*, issued by George III in October 1763, declared the Great Lakes area beyond the Appalachian Mountains to be Indian territory. It was to be strictly off limits to settlers until Indian interests in the land had been formally surrendered to the Crown. At a council of 24 Indian nations assembled at Niagara in August 1764, Johnson conveyed this news to the "Iroquois Confederacy" and the "Western Confederacy."[35] The Indian Nations at the Niagara council pledged their loyalty and future military assistance to Britain, and the British extended the symbolic "Covenant Chain," developed earlier through relations with the Iroquois, to include the "western" nations that had previously been independent or allied with France.[36] Britain further promised annual presents to its Indian allies to secure their loyalty.[37] A wampum belt signifying and preserving these new alliances made at Niagara in 1764 was, at Johnson's request, kept by the Ojibwa at Mackinac.[38]

Settlement by "land-hungry settlers from New York, Pennsylvania, and Virginia" was not entirely controlled but, by giving presents to maintain its alliances with the resident tribes, Britain succeeded in protecting the game-rich region of the Great Lakes for its fur traders for several decades.[39] The "presents" had both symbolic and economic value for people whose livelihood depended on hunting, fishing, and trapping. Typically they consisted of items such as firearms, including gunpowder, ball and shot, flints, and gunsmith supplies and services; domestic goods such as knives, scissors, and kettles; pipes and tobacco; hunting and fishing supplies; tools such as traps, axes, and tents; clothing, blankets, yard goods, thread and awls; and symbolic and cosmetic items including combs, mirrors, ribbons, face paints, bracelets, medals, and flags.[40]

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[34] R. David Edmunds, "Potawatomi," in *Encyclopedia of North American Indians*, ed. Frederic E. Hoxie (New York: Houghton Mifflin, 1996), 506; Clifton, "Potawatomi," in *Handbook of North American Indians*, vol. 15, 728 (ICC Exhibit 12); Carl Waldman, *Atlas of the North American Indian* (New York: Facts on File, 1985), p. 108. Pottawatomi were involved in the siege of Fort Detroit and the capture of Fort St Joseph in southern Michigan.

[35] Paul Williams, "'The King's Bounty': A Short History of the Distribution of Indian Presents, 1764-1858," DIAND, Claims and Historical Research Centre, Item I-136 (ICC Exhibit 10, p. 2). The "Iroquois Confederacy" was joined on this occasion by the Nanticoke, Conoy, and Mohicander; the "Western Confederacy" consisted at this meeting of Chippewa, Ottawa, Menominee, Sauk, Fox, Winnebago (also representing Sioux), Huron, Cree, and Kickapoo. The Pottawatomi were associated with the western group.

[36] Paul Williams, "'The King's Bounty': A Short History of the Distribution of Indian Presents, 1764-1858," DIAND, Claims and Historical Research Centre, Item I-136 (ICC Exhibit 10, pp. 2-6).

[37] Paul Williams, "'The King's Bounty': A Short History of the Distribution of Indian Presents, 1764-1858," DIAND, Claims and Historical Research Centre, Item I-136 (ICC Exhibit 10, pp. 2-6). Williams refers to the promise of presents as "perpetual," but does not provide a citation to support this conclusion.

[38] Paul Williams, "'The King's Bounty': A Short History of the Distribution of Indian Presents, 1764-1858," DIAND, Claims and Historical Research Centre, Item I-136 (ICC Exhibit 10, pp. 2-6). That Mackinac was the home of the 1764 wampum is of interest when one considers that, during the War of 1812, Superintendent Dickson began his campaign to reinforce the western Indians' alliances with the British at nearby St Joseph.

[39] James A. Clifton, "'Visiting Indians in Canada,'" manuscript for Parks Canada booklet, 1979 (ICC Exhibit 11, pp. 8-9).

Britain's investment in presents was heaviest in years when Indian military assistance was most needed, such as during the American Revolution and the War of 1812.[41] For a variety of reasons, the practice evolved into a predictable pattern of annual distributions at British posts such as Amherstburg, Mackinac Island, Drummond Island, Manitoulin Island, and Penetanguishene. Britain's Indian allies were actively encouraged to expect them.

The American Revolution and the Struggle for Homelands, 1775-94

Among American colonists, the restrictions on westward expansion were as resented as taxes. In 1775, this colonial resistance to British authority erupted in armed rebellion. In 1783, another Treaty of Paris ended the American Revolution, or the War of Independence. The treaty recognized American independence and provided for settlement as far west as the Mississippi River, but made no provision for the Indian allies of the British. South of the border, the Indians were left to fend for themselves in a hostile environment.[42]

The majority of Indians had supported the losing side in the American Revolution because the British had promised to protect their lands and because the Indians regarded American rebels as trespassers.[43] Pottawatomi from what is now Michigan and Indiana generally supported the British; however, some Pottawatomi in Illinois and Wisconsin sided with the Americans.[44] With the American victory, many more fur traders and settlers flooded into the area south of the western Great Lakes, the homeland of the Pottawatomi, Ottawa, Chippewa, Miami, Shawnee, Kickapoo, Fox, Sauk, Winnebago, and Menominee. Settlers displaced and disrupted the tribes; disease and warfare reduced their numbers. Immediately after the American Revolution, in 1784, the Governor of Canada, Frederick Haldimand, offered asylum in British North America to dispossessed Indian loyalists.[45] The main response to this invitation at that time was by the Iroquois.

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[40] James A. Clifton, "'Visiting Indians in Canada," manuscript for Parks Canada booklet, 1979 (ICC Exhibit 11, pp. 17-20). Clifton noted at pp. 17-19 (emphasis added) that

> *[r]egardless of American protests to the contrary, firearms, gun flints, powder, ball, shot, gun worms, and gunsmith's supplies and services were the lesser part of these supplies.* More prominent were a dozen and more different kinds of woven goods – Cuddies and Molton (duffle), Rateens and Strouds, Irish Linens and Printed Calicoes, Striped Cottons and Silk Handkerchiefs were some of these, together with Scissors, Thimbles, Needles, Awls, Thread, and a supply of ready made clothing such as Shirts, Jackets, Leggings, Wrappers, Petticoats, Officer's Dress Coats, Hats Plain and Hats with Fancy Lace. Fishing supplies – Hooks, Lines, and Netting were also delivered, as were various types of implements and tools – Axes, Brass and Tin Kettles in various sizes, Tenting, Traps, and Fire Steels. And Blankets – 1 point, 1½ point, 2 point, 2½ point, and 3 point, depending upon the age and importance of the recipient. To accompany all of these necessaries were various symbolic and cosmetic goods: Vermilion for face paint, Combs, Ribbons, Bracelets, Gorgets, Medals, and Flags, and Looking Glasses to admire the product with.

[41] Memorandum on "Indian Presents," no author or recipient indicated, September 23, 1943, DIAND, Claims and Historical Research Centre, Item 1-116 (ICC Documents, p. 348).

[42] Allen, *His Majesty's Indian Allies* (ICC Exhibit 4, p. 56); Carl Waldman, *Atlas of the North American Indian* (New York: Facts on File, 1985), 114.

[43] Carl Waldman, *Atlas of the North American Indian* (New York: Facts on File, 1985), 109.

His Majesty's Indian allies who remained in the United States after the Revolution continued to fear both the loss of their lands and retaliation by Americans for their support of the British. Indeed, tribes in the Ohio Valley were shocked to learn that their lands had been ceded by the British King to the Americans.[46] Even worse, the Americans maintained that they had forfeited their aboriginal title simply by fighting with the British.[47] The Indians fought Americans for another decade in an unsuccessful effort to defend their homelands.[48]

By 1800, more than one hundred Pottawatomi villages were dispersed over a wide area owing to the effects of warfare, population expansion, the fur trade, the clan system, and internal cultural pressures, all of which contributed to the breakup of larger villages. Thus, the most important geopolitical unit for the Pottawatomi was the village, the product of the migration of clans and clan segments into new territories.[49]

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[44] R. David Edmunds, "Potawatomi," in *Encyclopedia of North American Indians*, ed. Frederic E. Hoxie (New York: Houghton Mifflin, 1996), 506.

[45] Robert Surtees, *A Cartographic Analysis of Indian Settlements and Reserves in Southern Ontario and Southern Quebec, 1763-1867* (Ottawa: DIAND Publication QS-3414-000-EE-A1, 1985) (ICC Exhibit 18, pp. 37-38); Allen, *His Majesty's Indian Allies* (ICC Exhibit 4, p. 58).

[46] Allen, *His Majesty's Indian Allies* (ICC Exhibit 4, p. 59).

[47] Allen, *His Majesty's Indian Allies* (ICC Exhibit 4, p. 59). At p. 80, however, Allen notes that about 10 years later the Americans admitted that they had merely obtained the right to acquire Indian land through formal negotiation and purchase.

[48] Pottawatomi participated in the struggle for the Ohio Valley and defeated Americans attacking Miami towns in October 1790. Under the leadership of Miami Chief Little Turtle, Pottawatomi warriors probably were involved in another defeat of the American army south of the Wabash River in November 1791. These particular defeats made the British so nervous that they unsuccessfully attempted to create a buffer zone to the south for the defence of Canada. In particular, in defiance of the 1783 Treaty of Paris, Britain built a well-stocked post, Fort Miami, south of Detroit. In June 1794, Little Turtle's warriors suffered such a serious setback at Fort Recovery that some of his allies from the Lakes defected. The strategy of the British Indian Department and military was to reassure those still with Little Turtle that they had resources at Fort Miami. But, in August 1794, at the Battle of Fallen Timbers, the British literally closed their doors, abandoned their Indian allies, and failed to deliver on their many promises of military assistance. The tribes were smashed and had to surrender the Ohio Valley by the Treaty of Greenville in 1795. Allen, *His Majesty's Indian Allies* (ICC Exhibit 4, pp. 71-76 and 82-84).

[49] Clifton, "Potawatomi," in *Handbook of North American Indians*, vol. 15, 731-32 (ICC Exhibit 12).

Offer of Asylum in Canada, 1795

In 1795, fearing future aggression from the United States and wanting to develop the British-Indian association vital for the defence of Canada, Lieutenant Governor Sir John Graves Simcoe renewed the offer of asylum in Canadian territory to Indians living within the United States.[50] At that time, however, fewer came than the British expected.[51]

When Britain gave up the last of its western posts in American territory in 1796,[52] it began building three replacement forts in Canada: Fort Malden, Fort George, and Fort Joseph.[53] The Indian Department instructed its superintendents at the three new posts to promote friendship between the troops and the Indians and to keep careful records of the Indians' "disposition," any public speeches to them, and all transactions with them.[54] At Fort Malden (Amherstburg), the commander, Captain Hector McLean, opposed using presents as subsidies to encourage American Indians to visit and settle in Canada. He expected that those who came would become a burden on the government because subsidies would turn them "effeminate and indolent."[55]

Councils at Amherstburg, 1808 and 1810

Complicated by the eruption of war in Europe, Anglo-American relations deteriorated steadily after 1803.[56] Americans feared British-instigated Indian attacks on their frontier settlements, while officials in Canada cultivated the Indians' loyalty in preparation for an attack by the Americans. In the autumn of 1808, the superintendent at Fort George, William Claus, held a council of 5000 warriors and chiefs, mostly from the United States, at Amherstburg (the main Indian centre in the province) to let the Indians know that, if peace with the United States was not possible, the Indians and the British would together regain the country taken from them.[57] The message was so popular that, for the next two years, tribal delegates constantly visited the British at Amherstburg to pledge their support and to receive gifts and provisions in return.[58] In 1810, Pottawatomi were among the 2000 Indians who came and announced they were ready to "defend [our Country] ourselves" with supplies from the British.[59]

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[50] After the Battle of Fallen Timbers (see footnote 48) the offer of asylum was a way to placate the Indians' anger over Britain's betrayal of its promises.

[51] James A. Clifton, "'Visiting Indians' in Canada," manuscript for Parks Canada booklet, 1979 (ICC Exhibit 11, pp. 36-37). By 1796, the Mississauga in Canada had also become disillusioned with the British – whom the Indians then considered being "as bad as the Americans" – for taking away Indian lands for United Empire Loyalists and other settlers. Mohawk leader James Brant bitterly complained that "the poor Indians have been left in the lurch." Allen, *His Majesty's Indian Allies* (ICC Exhibit 4, pp. 92-93).

[52] Allen, *His Majesty's Indian Allies* (ICC Exhibit 4, pp. 82-84).

[53] Allen, *His Majesty's Indian Allies* (ICC Exhibit 4, pp. 89-90). Fort Malden was situated at Amherstburg, between Lake Erie and Lake St Clair on the Detroit River; Fort George between Lake Erie and Lake Ontario on the Niagara River; and Fort Joseph on St Joseph Island between Lake Huron and Lake Superior in the mouth of the St Mary's River.

[54] Allen, *His Majesty's Indian Allies* (ICC Exhibit 4, p. 90).

[55] James A. Clifton, "'Visiting Indians in Canada," manuscript for Parks Canada booklet, 1979 (ICC Exhibit 11, p. 36).

[56] The British navy interrupted shipping to the United States, and an 1807 British attack on the American frigate *Chesapeake* escalated anti-British feelings. Meanwhile, a militant Indian Confederacy was forming in western Ohio and Indiana under the Shawnee Prophet or Tenskawatwa. Allen, *His Majesty's Indian Allies* (ICC Exhibit 4, pp. 108-11).

When the United States formally declared war on Great Britain on June 18, 1812, Britain's commitments in Europe, India, and South Africa meant that soldiers and provisions were in short supply for operations in Canada.[60] For this reason, Britain's employment of Indian allies proved to be "the single most important factor in the successful defence of Upper Canada."[61]

The War of 1812

Of the 10,000 Indians aligned with the British in 1812, more than 8000 were "western Indians," including some 2000 Pottawatomi, living in the United States.[62] That year the British took Michilimackinac (Mackinac) and Detroit with Indian support.[63] In January 1813, British fur trader Robert Dickson was named superintendent responsible for "Indians of the Nations to the Westward of Lake Huron." To rally the western Indians again, he held a series of councils and, in July 1813, arrived at Detroit with so many warriors that provisioning from Fort Malden at Amherstburg became a challenge.[64] Dickson's formal instructions were to renew the "historical bonds of trust and friendship" between the western Indians and the British Crown.

Dickson appealed to the western Indians' hatred for aggressive American territorial ambitions. He made frequent reference to the wampum belt and

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[57] In Canada, the Six Nations and the Mississauga were not especially interested in this message. Although Tenskawatwa did not attend, his many followers did, along with Tecumseh, his influential brother who had fought with Little Turtle at the Battle of Fallen Timbers. Allen, *His Majesty's Indian Allies* (ICC Exhibit 4, pp. 112-15).

[58] Allen, *His Majesty's Indian Allies* (ICC Exhibit 4, p. 115).

[59] The British were chagrined because they did not want the Indians attacking Americans without a declaration of war between Great Britain and the United States. Allen, *His Majesty's Indian Allies* (ICC Exhibit 4, pp. 115-16).

[60] Allen, *His Majesty's Indian Allies* (ICC Exhibit 4, pp. 119-20).

[61] Allen, *His Majesty's Indian Allies* (ICC Exhibit 4, p. 120).

[62] Allen, *His Majesty's Indian Allies* (ICC Exhibit 4, pp. 121-22 and Appendix B). There appear to be some minor discrepancies in the numbers reported in Allen's summary on pp. 121-22 and in the Appendix.

[63] Allen, *His Majesty's Indian Allies* (ICC Exhibit 4, pp. 128-30 and 137-40). Ogemawahj, the Pottawatomi immigrant from whom most Pottawatomi of the Moose Deer Point First Nation claim descent, is thought to have been involved in the battle for Mackinac. Franz M. Koennecke, "The Anishinabek of Moose Deer Point Reserve No. 79: A Historical View," June 30, 1983 (ICC Exhibit 9, p. 25, and footnotes 9 and 10). From the footnotes, the exact source of this information is not clear. In fact, within footnote 9, Koennecke states: "[I]t is more likely Ogeemawatch/Quasing had been involved in the 1812 taking of Mackinac from the surprised American troops who had not even known the war had started."

[64] Allen, *His Majesty's Indian Allies* (ICC Exhibit 4, pp. 140-44).

Sir William Johnson's 1764 promise at Niagara that the king "never would forsake or abandon" them. He distributed wampum belts, flags, and medals of King George, which were earnest symbols of the alliance between the bands and the British Crown. Moreover, the speech that the Indian Department required him to deliver pledged the loyalty of the Crown to the Indians in the clearest of terms.[65]

Much to the surprise of Tecumseh and the Confederacy of Shawnee, Pottawatomi, Ottawa, Ojibwa, Winnebago, Sauk, and other tribes that had rallied at Detroit, the British troops withdrew from Amherstburg as soon as the Americans gained control of Lake Erie.[66] As the British soldiers retreated along the Thames River, Tecumseh's warriors faced and fought the American cavalry for an hour until the famous warrior's death there on October 5, 1813, at the Battle of Moraviantown.[67]

The final outcome of the War of 1812 was that, through the Treaty of Ghent on December 24, 1814, the ambitions of the Indians and the Canadians were disregarded in the interest of renewed cordiality in Anglo-American relations.[68] For example, Fort Michilimackinac, which was vital for the preservation and defence of British interests in the Northwest and which Americans ignored for most of the war, was turned over to the United States troops in July 1815.[69]

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[65] In part, Dickson stated:

> But my Children, I have not nor will I lose hold of the Belt which has been so long among you from Sir William Johnson – on the contrary, I will now make it stronger by the Belt which I now present to you, and never will I leave you but as Your Father, see that Justice is done to you by the Big Knives [Americans] and that your hunting Grounds shall be preserved for your use, and that of your Children agreeably to the Treaty made at Gre[e]nville with their General Wayne some years ago [1795]. – My Children, with this Belt I call upon you to rouse up your young Warriors and join my Troops with the red Coats, and your ancient Bretherin the Canadians, who are also my Children, in order to defend your and our Country. . . .
>
> My Children, listen not to the Songs of wild birds who may tell you that the English will make Peace with the Enemy when it suits their own convenience without consulting your Interest. *My words* are pledged to you that this will never happen.

Speech of Robert Dickson Esquire to Indian tribes, January 18, 1813, in Allen, *His Majesty's Indian Allies* (ICC Exhibit 4, pp. 223-24).

[66] Allen, *His Majesty's Indian Allies* (ICC Exhibit 4, pp. 144-45). In 1814, Major General Procter was court martialled and reprimanded for his retreat from Fort Amherstburg and the Battle of Moraviantown.

[67] Allen, *His Majesty's Indian Allies* (ICC Exhibit 4, pp. 144-46).

[68] Allen, *His Majesty's Indian Allies* (ICC Exhibit 4, pp. 166, 168-71).

[69] Allen, *His Majesty's Indian Allies* (ICC Exhibit 4, pp. 155-65).

SITUATION AFTER THE WAR OF 1812

Presents

On the same day that the British vacated Michilimackinac, some Pottawatomi signed a peace treaty with the United States government that required the Indians to desist from hostilities.[70] Other tribes also made peace with the American government,[71] but that fact did not prevent Britain's former Indian allies from continuing to visit the British to collect the annual presents distributed at Amherstburg (Fort Malden) and the new post at Drummond Island, located between the northeastern tip of Michigan and Manitoulin Island.

The Drummond Island Indian agency under Superintendent Thomas Gummersall Anderson was noteworthy because of Anderson's close connections to both the Pottawatomi and the "civilization" plans of the British Indian Department. Anderson distributed presents there from 1815 until 1828, when the Boundary Commission put Drummond Island on the American side and the British had to evacuate.[72] In 1829, Anderson distributed the British presents at nearby St Joseph Island while he was in the process of moving the agency to Penetanguishene.[73]

In 1828, three-quarters of the 9422 Indians who received presents at Drummond Island and Amherstburg were from the United States.[74] When Anderson was pulling out of the area around Mackinac in 1829, Wisconsin Pottawatomi asked him if they could count on British support for another western Indian action "to crush" the Americans whom they had learned were intending to force them west of the Mississippi. No help was forthcoming, however, because Britain wanted peace.[75]

Present-giving proved to be a controversial system for keeping peace. On the British side alone, it was fraught with confusion and abuse:

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[70] Allen, *His Majesty's Indian Allies* (ICC Exhibit 4, p. 169).

[71] Allen, *His Majesty's Indian Allies* (ICC Exhibit 4, p. 169).

[72] Anderson was also the Customs Collector – a lucrative position "often held by members of leading families" – at Drummond Island until 1828. His counterpart at Amherstburg, John Wilson, was dismissed in 1831 after 14 years at that point of entry. Frederick H. Armstrong, *Handbook of Upper Canadian Chronology* (Toronto: Dundurn Press, 1985), 217-20.

[73] James A. Clifton, *A Place of Refuge for All Time: Migration of the American Potawatomi into Upper Canada, 1830 to 1850*, Canadian Ethnology Service Paper No. 26 (Ottawa: National Museums of Canada, 1975) [hereafter Clifton, *A Place of Refuge*] (ICC Exhibit 13, p. 119); Catherine A. Sims, "Algonkian-British Relations in the Upper Great Lakes Region: Gathering to Give and Receive Presents, 1815-1843," PhD thesis, University of Western Ontario, 1992, p. 44.

[74] Clifton, *A Place of Refuge* (ICC Exhibit 13, pp. 25-26).

[75] Clifton, *A Place of Refuge* (ICC Exhibit 13, p. 28).

> British officials . . . were never of one uniform mind about the meaning and merit of the custom. It always had its detractors as well as its supporters. Those regularly favoring presents tended to be the agents and officials most directly involved . . . particularly the local superintendents and storekeepers with the strongest vested interests. . . . In contrast the critics were generally high placed officers, particularly those in branches of government outside the Indian Department such as the Military and the Treasury.[76]

The highest British authorities believed presents were "a matter of charity, equity and generosity, not a legal obligation."[77] The Indian allies, once regarded by the British as "western Indians," became "visiting Indians."[78] The Indian allies viewed the annual presents as their legitimate due for past and possible future services performed in the British interest and even for lands they had lost.[79]

American Treaties and Removal, 1830s

In 1830, the United States government passed the ***Indian Removal Act*** to relocate eastern American tribes west of the Mississippi River. Indians who refused to go were left with cramped reserves in their traditional homelands or, more often, with nothing. In the wake of the Black Hawk War of 1831 and the depletion of game in Illinois and Indiana, the Pottawatomi were ordered out of Illinois in 1832. Several hundred left for Indiana and requested assistance to move westward, but, after viewing the proposed new location, only a few dozen actually completed the move at that time. Subsequently, by means of the 1833-34 Treaties of Chicago with the "United Bands of Ottawa, Chippewa, and Potawatomi," the American government induced the Pottawatomi to cede all their remaining lands in the Lake Michigan area for other lands in Iowa. The Pottawatomi were allowed to stay in Illinois, Indiana, Michigan, and Wisconsin for another three or four years until militia units forced as many Pottawatomi as they could find to march west.[80] Still, this group constituted less than half the total Pottawatomi population, and many of those who moved west later moved back to Wisconsin and Michigan.[81]

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[76] James A. Clifton, "'Visiting Indians' in Canada," manuscript for Parks Canada booklet, 1979 (ICC Exhibit 11, pp. 22-23).

[77] James A. Clifton, "'Visiting Indians in Canada," manuscript for Parks Canada booklet, 1979 (ICC Exhibit 11, p. 29).

[78] The British-originated terms "visiting Indians" and "resident Indians" are problematic in that they do not reflect the international border's lack of importance to most of the Indians of the Great Lakes region. The use of these conceptually flawed terms throughout this report arises from their frequent appearance in the historical documents and not from any belief that their meaning is fair to all parties.

[79] James A. Clifton, "'Visiting Indians in Canada," manuscript for Parks Canada booklet, 1979 (ICC Exhibit 11, p. 29).

[80] Clifton, "Potawatomi," in *Handbook of North American Indians*, vol. 15, 728 (ICC Exhibit 12); Clifton, *A Place of Refuge* (ICC Exhibit 13, pp. 30-32, 43-44); Franz M. Koennecke, "The Anishinabek of Moose Deer Point Reserve No. 79: A Historical View," June 30, 1983 (ICC Exhibit 9, p. 17).

In 1837, all Pottawatomi remaining in the Lake Michigan area effectively became refugees. They had no lands, no cornfields, and no safe hunting grounds, and the American government stopped paying annuities to all except those who had made the move across the Mississippi.[82] Ultimately, fewer than half stayed west of the Mississippi, but many moved into Canada around 1837 to avoid removal.[83] Anthropologist James Clifton estimates the number of Pottawatomi who moved to and stayed in Canada at about 3000, or "about one-third of the total tribal population in the 1830s."[84]

The Policy of Civilization and Christianization, 1830-35

In the late 1820s a reorganization of the Indian administration reintroduced civil authority, split the department on provincial lines, and created five superintendencies in Upper Canada.[85] This arrangement lasted through the union of Upper and Lower Canada in 1841 and until the next reorganization, which began around 1845.[86] In Upper Canada, Sir John Colborne held the post of Lieutenant Governor from 1830 until late 1835, when he was succeeded by Sir Francis Bond Head for 1836 and 1837 and Sir George Arthur from 1838 to 1841. The Chief Superintendents of Indian Affairs during this period were Colonel James Givins from 1830 to 1837 and Samuel Peters Jarvis from 1837 to 1845.[87]

In about 1830, Colborne initiated an official Indian policy of civilization and Christianization, which involved establishing model Indian villages at places such as Sarnia and Coldwater and leasing and selling Indian lands.[88] The Coldwater settlement, located between Georgian Bay and Lake Simcoe and operating under the direction of the influential Superintendent Thomas Anderson, lasted less than six years from its inception in 1830. At the time the Coldwater civilization project was announced in 1829, Manitoulin Island had been regarded as an alternative site to the Penetanguishene/Coldwater area.[89]

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[81] Clifton, *A Place of Refuge* (ICC Exhibit 13, p. 31).

[82] Clifton, *A Place of Refuge* (ICC Exhibit 13, p. 32).

[83] Clifton, *A Place of Refuge* (ICC Exhibit 13, p. 32).

[84] Clifton, *A Place of Refuge* (ICC Exhibit 13, p. 34).

[85] Central, Western, Coldwater and the Narrows, Carradoc and Moravian reserves, and Six Nations.

[86] After February 1841, Upper Canada became "Canada West."

[87] Douglas Leighton, "The Compact Tory as Bureaucrat: Samuel Peters Jarvis and the Indian Department, 1837-1845" (March 1981) 72:1 *Ontario History*, 40-41.

[88] Robert J. Surtees, "Indian Land Cessions in Ontario, 1763-1862," PhD thesis, Carleton University, 1982 (ICC Exhibit 17, pp. 31-32); Olive P. Dickason, *Canada's First Nations* (Toronto: McClelland & Stewart, 1992), 234.

Anderson had moved his agency from Drummond Island[90] to Penetanguishene in 1829 and to nearby Coldwater in 1830, and he distributed presents at Coldwater and Penetanguishene until 1835. By early 1837, after the demise of the Coldwater project, he became responsible for establishing a new agency on Manitoulin Island (see map 3 on page 162).

The Coldwater project had involved constructing an agency building at Coldwater and houses with agricultural plots for Indians along a road cut for the project from Coldwater to the Narrows of Lake Simcoe (Orillia). Three Chippewa bands under Chiefs William Yellowhead (Musquakie), Snake, and John Aisance (Assance) participated in this endeavour, along with a fourth group variously referred to in historical records as either "a band of Pottiwatamies from Drummond Island"[91] or "Potaganasee Ojibwa from Drummond Island."[92]

The failure of the Coldwater project has been attributed to various internal and external factors. Among them were religious rivalries among the Indian groups that had been converted to the Anglican, Methodist, or Roman Catholic faiths. Non-native encroachment, owing to the short-cut the road offered to Lake Huron, was another. The Indians' fear of disease from proximity to whites[93] and their continued interest in hunting, fishing, and trapping gave them still other reasons to continue what Superintendent Anderson's daughter characterized as their "wandering habits."[94] Following the project's

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[89] Catherine A. Sims, "Algonkian-British Relations in the Upper Great Lakes Region: Gathering to Give and Receive Presents, 1815-1843," PhD thesis, University of Western Ontario, 1992, pp. 101-03 and 110-11.

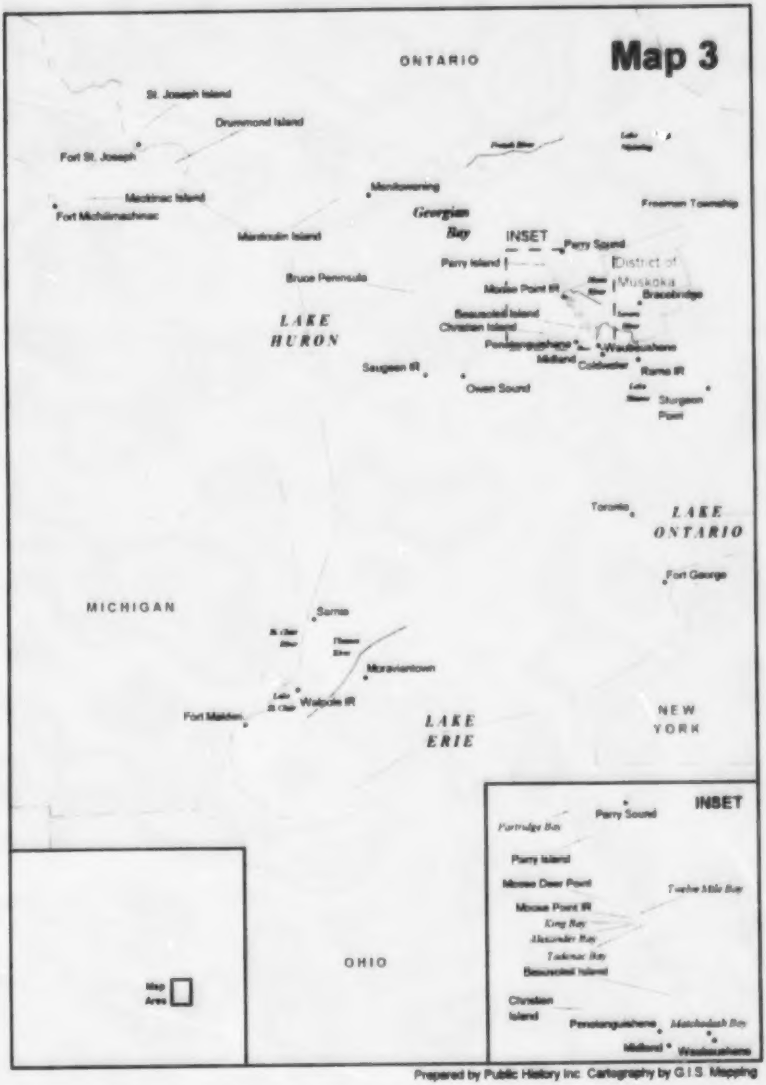
[90] Anderson's house at Drummond Island was called "Pottawatomie Hall" by Lieutenant-Colonel Robert McDouall, who had commanded Michilimackinac after 1813 and had arranged for Anderson's appointment to the Indian Department. Anderson, a Canadian-born son of a Loyalist lawyer from Boston, was originally from Cornwall on the St Lawrence River. He began as a fur trader based at Mackinac and operating on the Mississippi River west of Milwaukee. There, he was the partner of Robert Dickson, who had revived the western Indian-British alliance in 1813. For his role in taking Prairie du Chien from the Americans in 1814, Anderson was appointed to the Indian Department and allowed to retain his military rank of captain. Anderson's father had been a captain in the regiment of Sir John Johnson, Superintendent of Indian Affairs from 1782 to 1828, during the Revolutionary War. Afterwards, his father served as a judge of the Surrogate Court and of the Eastern District Court until 1814. Anderson's brother married into the family of the first Chief Superintendent of Indian Affairs appointed under Canadian authority, P.M. Vankoughnet, who served from 1860 to 1862. Mrs S. Rowe, "Anderson Record from 1699 to 1896" (1905) 6 Ontario Historical Society, *Papers and Records*, 113-14, 116, 128; Clifton, *A Place of Refuge* (ICC Exhibit 13, pp. 90 and 106-07); Douglas Leighton, "The Compact Tory as Bureaucrat: Samuel Peters Jarvis and the Indian Department, 1837-1845" (March 1981) 72:1 *Ontario History*, 40-53.

[91] Sir Charles Bagot, "Report on the Affairs of Indians in Canada," March 20, 1845 (ICC Documents, pp. 27-29).

[92] Catherine A. Sims, "Algonkian-British Relations in the Upper Great Lakes Region: Gathering to Give and Receive Presents, 1815-1843," PhD thesis, University of Western Ontario, 1992, pp. 103 and 153-54.

[93] Catherine A. Sims, "Algonkian-British Relations in the Upper Great Lakes Region: Gathering to Give and Receive Presents, 1815-1843," PhD thesis, University of Western Ontario, 1992, p. 188.

[94] Mrs S. Rowe, "Anderson Record from 1699 to 1896" (1905) 6 Ontario Historical Society, *Papers and Records*, 130.


Map 3
ONTARIO
St. Joseph Island
Drummond Island
Fort St. Joseph
Mackinac Island
Fort Michilimackinac
Manitowaning
Manitoulin Island
Georgian Bay
INSET
Parry Sound
Parry Island
District of Muskoka
Freeman Township
Moose Point IR
Bracebridge
Beausoleil Island
Christian Island
Penetanguishene
Waubaushene
Midland
Coldwater
Rama IR
Bruce Peninsula
LAKE HURON
Saugeen IR
Owen Sound
Sturgeon Point
Toronto
LAKE ONTARIO
Fort George
MICHIGAN
Sarnia
Moraviantown
Walpole IR
Fort Malden
LAKE ERIE
NEW YORK
OHIO
Map Area
INSET
Parry Sound
Partridge Bay
Parry Island
Moose Deer Point
Twelve Mile Bay
Moose Point IR
King Bay
Alexander Bay
Tadenac Bay
Beausoleil Island
Christian Island
Penetanguishene
Matchedash Bay
Midland
Waubaushene

Prepared by Public History Inc. Cartography by G.I.S. Mapping

demise, its houses went to ruin as many Indians at the Narrows moved to Rama and others from Coldwater relocated to Beausoleil Island.[95] At about the same time, incoming Lieutenant Governor Head initiated his scheme for congregating as many Indians as possible at Manitoulin Island.

Before any official announcement of Head's plan, a small group of "heathen" Pottawatomi had already taken up residence at Manitowaning on Manitoulin Island. Anderson thought they had located there in about 1833. Because they were few in number, they raised no immediate questions of policy with regard to rations or land on which they could settle.[96]

In 1834, Anderson advised Chief Superintendent Givins that some Chippewa, Ottawa, and Pottawatomi living in the United States had asked to settle on Manitoulin Island. Expecting that half of them would relocate, Anderson assured Givins that "we will send them proper teachers from our Church."[97] In September of the following year, Anderson wrote Lieutenant Governor Colborne about the desire of these Indians to settle in Upper Canada. Anderson felt that the British had a moral debt to the Indians and that it would be worthwhile to concentrate them on Manitoulin Island:

> [O]f late years the distribution of presents at Penetanguishene has brought to the vicinity of Coldwater many of the more distant tribes and their visits to the settlement have been frequent. . . .
>
> Tribes of our Indian allies are Driven from the United States territory and are claiming your protection. . . .
>
> Our Indian allies emigrating from the United States and seeking our protection as well as the British Indians whose means of subsistence are exhausted have claims on our humanity which would most easily be satisfied by forming one extensive establishment for the purpose of leading them to the arts of civilized life. . . .
>
> The Manitoulin, an Island on the North side of Lake Huron in extent about one hundred miles by thirty, appear[s] to be the most suitable for the purpose.[98]

Colborne supported the general idea of establishing "the Indians of the Northern Shores of Lake Huron" on Manitoulin Island, where Anderson, together with a missionary and a schoolmaster, would "endeavor to civilize the Tribes which may be attracted to place themselves under their Charge."[99]

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[95] Mrs S. Rowe, "Anderson Record from 1699 to 1896" (1905) 6 Ontario Historical Society, *Papers and Records*, 130; Sir Charles Bagot, "Report on the Affairs of Indians in Canada," March 20, 1845 (ICC Documents, pp. 26-29).

[96] Clifton, *A Place of Refuge* (ICC Exhibit 13, p. 65).

[97] Clifton, *A Place of Refuge* (ICC Exhibit 13, p. 65). Clifton's source for the quote is simply "RG 10, vol. 2789." Anderson was a staunch Anglican.

[98] Clifton, *A Place of Refuge* (ICC Exhibit 13, p. 90); T.G. Anderson, Indian Superintendent, Coldwater, to Sir John Colborne, Lieutenant Governor, September 24, 1835, in "Pottawatomie Correspondence Collected by Franz Koennecke" (ICC Exhibit 15, pp. 1-2). The reference cited by Koennecke is National Archives of Canada (NA), RG 10, C-11019, vol. 59, at pp. 59866, [59]897, [59]900, [59]901, and [59]904.

Early in the summer of 1835, 215 Chippewa and Pottawatomi from the Milwaukee area on Lake Michigan, many of whom had served the British in the War of 1812, travelled to Penetanguishene. They too informed Anderson that they had "come to reside and seek protection."[100] In response to Anderson's request for instructions, it seems that Chief Superintendent Givins's reply on July 29, 1835, gave permission to "afford them asylum" in the province.[101]

Head's Plan for the Indians of Upper Canada, 1836

In November 1835, Colborne was replaced by Head, to whom the Colonial Office looked for recommendations on how to manage Indian affairs. Head therefore made a tour of most of the Indian settlements in Upper Canada to "judge . . . the actual situation of that portion of the Indian population which is undergoing the operation of being civilized." In the summer of 1836, he attended the annual delivery of presents to the "visiting Indians" at Amherstburg and, for the first time, on Manitoulin Island.[102]

Whatever the challenges posed by the northerly and waterbound location of Manitoulin Island, thousands of Indians arrived there to receive presents and, it turned out, to surrender Manitoulin Island and the Bruce Peninsula. At a formal council of about 1500 Indians of "various tribes" at Manitowaning on August 9, 1836, Head secured for the Crown and set aside both Manitoulin Island and the Bruce (Saugeen) Peninsula for the settlement and "civilization" of Indians.[103]

The Ottawa and Chippewa gave up a series of "23,000" islands, including Manitoulin, with a view to making "them the Property (under your Great Father's Control) of all Indians who he shall allow to reside on them."[104] The

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[99] Robert J. Surtees, *Treaty Research Report: Manitoulin Island Treaty* (Ottawa: DIAND, 1986), 5.

[100] Clifton, *A Place of Refuge* (ICC Exhibit 13, p. 65).

[101] Clifton, *A Place of Refuge* (ICC Exhibit 13, p. 65). Clifton's cite for this short quote is "RG 10, vol. 2789." Research notes supplied to the Commission as "Pottawatomie Correspondence Collected by Franz Koennecke" (ICC Exhibit 15, p. 1) suggest that there is "an unsigned note on a second page" saying: ". . . the Indians may remain under our protection and have land offered to them, but that there are no funds at the disposal of the Govt. to enable them to cultivate or to furnish them with. . . ." The reference cited is NA, RG 10, vol. 58, C-11019, pp. 59677-79.

[102] Sir F.B. Head to Lord Glenelg, November 20, 1836 (ICC Documents, p. 1).

[103] The August 9, 1836, treaty with Ottawa and Chippewa involving Manitoulin Island and all other islands on the north shore of Lake Huron is known, by Indian Affairs' consecutive numbering system, as Treaty 45. The treaty of the same date with the Sauking Indians was a corollary to this treaty and was designated Treaty 45½.

[104] Sir F.B. Head to Lord Glenelg, November 20, 1836 (ICC Documents, pp. 5-6); Olive P. Dickason, *Canada's First Nations* (Toronto: McClelland & Stewart, 1992), 237-38; Surtees, *Treaty Research Report: The Manitoulin Treaties*, 11.

Saugeen (Sauking) Indians gave up "a million and a half acres [607,028 hectares] of the very richest land in Upper Canada" and were to "repair either to this Island [Manitoulin] or that Part of [their] Territory which lies in the North of Owen's Sound."[105] Wampum was exchanged, the alliances and commitments made at the 1764 Council at Niagara were invoked, changing circumstances were acknowledged, and the solemn proceedings were duly witnessed by officials of the government and various religious denominations. No payment was made to the Indians for the lands they yielded to the government. The Indians were simply promised that Manitoulin Island and the Bruce Peninsula, together with their fisheries, would be protected from encroachment by settlers and that the Indians there would be given assistance with agriculture. No annuities flowed to the signatory bands from these agreements.[106]

In connection with his visit to Amherstburg that same summer, Head took smaller surrenders of "rich land" from the Huron and "Moravian Indians."[107] Of these, he remarked:

> I need hardly observe that I have thus obtained for his Majesty's Government from the Indians an immense portion of most valuable land, which will undoubtedly produce, at no remote period, more than sufficient to defray the whole of the expenses of the Indians and the Indian department in this Province.[108]

Head's primary mission was to save the government money by reducing expenditures for Indians.

After this tour, Head sent Colonial Secretary Lord Glenelg his plan for the management of Indian Affairs in Upper Canada. Rejecting the previous efforts to Christianize and civilize Indians by making them farmers, Head directed that Manitoulin Island and vicinity become a reserve or locale for all the Indians in Upper Canada "to retire or fall back upon."[109] The kindest course, in his estimation, was "to remove and fortify [the Indians] as much as possible from all communication with the Whites."[110]

Much of Head's dispatch from Toronto to the Colonial Secretary on November 20, 1836, appears below. In it, Head also discussed the nature of presents as well as the advantages and disadvantages of giving them. He suggested discontinuing presents to American Indians in three years, anticipating that few Indians would emigrate to Canada as a consequence of this change in policy.[111] He wrote:

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[105] Sir F.B. Head to Lord Glenelg, November 20, 1836 (ICC Documents, pp. 5-6); Surtees, *Treaty Research Report: The Manitoulin Treaties*, 11.

[106] Robert J. Surtees, *Indian Land Surrenders in Ontario, 1763-1867* (Ottawa: DIAND, 1984), 91-92.

[107] Sir F.B. Head to Lord Glenelg, November 20, 1836 (ICC Documents, p. 6).

[108] Sir F.B. Head to Lord Glenelg, November 20, 1836 (ICC Documents, p. 6).

[109] Sir F.B. Head to Lord Glenelg, November 20, 1836 (ICC Documents, p. 6).

[110] Sir F.B. Head to Lord Glenelg, November 20, 1836 (ICC Documents, p. 5).

> I am decidedly of opinion, that his Majesty's Government should continue to advise the few remaining Indians who are lingering in Upper Canada, to retire upon the Manitoulin and other Islands in Lake Huron, or elsewhere towards the North West.
>
> Your Lordship has informed me, that the Committee of the House of Commons on Military expenditure in the Colonies, are of opinion "that the Indian Department may be greatly reduced, if not altogether abolished, and they therefore call the attention of the House to the same, and also to the expense of articles annually distributed to the Indians, and whether any arrangement may not be made to dispense with such distributions in future, or to commute the presents for money."
>
> As it is your Lordship's desire that I should afford you as much information as possible in the above suggestions, I now respectfully endeavor to do so. . . .
>
> The presents which the British Government has been in the habit of granting to the Indians in Upper Canada, have been delivered in two classes, termed "the resident" and "the visiting" whose numbers were this year as follows.

No. of Indians resident in Upper Canada –	6,507
Average No. of I[ndian]s who in order to receive presents from the British Government annually visit Upper Canada from the United States –	3,270
Total [number of Indians receiving presents] –	9,777
Total average annual cost of presents issued as above –	£8,500

> It certainly appears to me very desirable indeed that we should, if possible, discontinue the practice of giving presents to that portion of the visiting Indians who reside in the territory of the neighbouring States, but what is desirable is not always just, and it is therefore necessary, before the project be carried into effect, that we should consider what arguments exists for, as well as against this.
>
> In its favor it may be stated,
>
> 1st. That we should save an annual expenditure of, say, £4,000.
>
> 2ndly. That according to common Laws among Nations, there appears to be no reason why, having lost all dominion over, and interest in, the United States, we should continue to make annual payments to any portion of its inhabitants.
>
> 3rdly. That it amounts almost to an act of hostility for the British Government to continue to give Guns, Powder and Ball, to the Indians of the United States, with whom that People are at this moment engaged in civil war.
>
> 4thly. That a considerable portion of the presents which we give to the Indians,

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[111] Sir F.B. Head to Lord Glenelg, November 20, 1836 (ICC Documents, pp. 15-16). This address also includes an appeal on behalf of Chief Superintendent Givins, whose "name is so identified with the Indian history of this Country" that Head asks that Givins be retired "on his full pay."

are shortly after their delivery, to be seen displayed for sale by the Shopkeepers of the United States, who often obtain them almost for nothing. . . .

In reply to the first objection, namely, "that by withholding the presents, we should save an annual expenditure of £4000," it may be stated that, of all the money which has ever been expended by the British Government, there is perhaps no sum which ought to be less regretted than that which we have hitherto bestowed upon the Aborigines of America. It has purchased for us the blessing of their race – they love us!! – they have shed their blood for us – they would do so again – they look upon us as the only just and merciful inhabitants of the Old World – and impressed with these feelings their attachment to our Sovereign amounts almost to veneration. "When we see the Sun rise in the East," said a Warrior to me at the Great Council at the Manitoulin Island, "it is our custom to say to our young men there is our Great Father, he warms us, he clothes us, he gives us all we desire."

There can be no doubt that up to the present page in the history of the British Empire, we have acted well towards the Indians. What that reflection may intrinsically be worth, it is not so easy to determine, as every man will perhaps estimate it differently; however, its moral value, whatever it may be, should be deducted from the expense of which we complain, for we cannot enjoy both advantages: if we save the latter we must lose the former. . . .

In reply to the second objection, namely, "that according to common laws among Nations, there appears to be no reason why, having lost all dominion over, and interest in the United States, we should continue to make annual payments to any portion of the inhabitants," it must be recollected that in our Wars with the Americans, we gladly availed ourselves of the services of the Indians, whom invariably we promised we never would desert. In these promises we made no restriction whatever, as to domicile; when the tribes joined us, we never waited to ask them whence they came[;] the close of the War when the surviving Warriors left us, we never prescribed to them where they should go.

It will be asked in what way were these our promises made? It is difficult to reply to this question, as it involves the character of the Indian race.

An Indian's word when it is formally pledged, is one of the strongest moral securities on earth, like the rainbow it beams unbroken when all beneath is threatened with annihilation.

The most solemn form in which an Indian pledges his word, is by the delivery of a Wampum belt of Shells, and when the purport of this symbol is once declared, it is remembered and handed down from father to son, with an accuracy and retention of meaning which is quite extraordinary.

Whenever the belt is produced, every minute circumstance which attended its delivery seems instantly to be brought to life, and such is the singular effect produced on the Indian's mind by this talisman, that it is common for him, whom we term "the Savage" to shed tears at the sight of a Wampum which has accompanied a message from his friend.

I have mentioned these facts, because they will explain the confident reliance the Indians place on the promises which, accompanied by the delivery of Wampums, were made to them by our Generals, during and at the conclusion of the American Wars.

These rude ceremonies had probably little effect upon our officers, but they sunk [sic] deep in the minds of the Indians. The Wampums thus given, have been preserved and are now entrusted to the keeping of the great Orator, Liginish, who was present at the Council I attended on the Manitoulin Island in Lake Huron, and in every sense, these hieroglyphics are moral affidavits of the bygone transactions to which they relate. On our part, little or nothing documentary exists – the promises which were made, whatever they might have been, were almost invariably verbal, those who expressed them are now mouldering in their graves. However, the regular delivery of the presents, proves and corroborates the testimony of the Wampums, and by whatever sophistry we might deceive ourselves, we could never succeed in explaining to the Indians of the United States, that their Great Father was justified in deserting them.

To the third and fourth objections I have nothing to reply, for I must say I think the Americans have reason for the jealousy they express at the British Government interfering by positively arming their own Indians with whom they are at War, with English guns, powder and ball. I also cannot deny that a great proportion of the presents we give to the American Indians form a tribute which we annually pay to the Shopkeepers of the United States. . . .

. . . I am of opinion that to the visiting Indians of the United States we cannot without a breach of faith, directly refuse to continue the presents, which by the word of our generals we have promised, and which by long custom we have sanctioned. On observing that the minds of these people were wide open to reasonable conviction, it occurred to me that it would not be difficult to explain to them that their Great Father was still willing to continue presents to such of his red children as lived on his own Land, but that in justice to the Americans who are now our Allies, he could not arm against them those Indians who should continue to reside in the Territory of the United States, and consequently, that after the expiration of three years, presents would only be given to those of our red children who actually shall inhabit the Canadas.

I did not formally make this declaration at the Great Council at the Manitoulin Island, but it was sufficiently hinted to them to be clearly understood, and as far as I could learn and, have since learned, it was received without disapprobation.

I would therefore recommend that this declaration should be formally announced at the next delivery of presents. The Indians of the United States would then have plenty of time to prepare for the change, which I feel quite confident would end by our being released honorably and altogether from an engagement which I certainly think we have maintained long enough to reward liberally the United States Indians for the Services they rendered us during the War. . . .

I do not think the Indians of the United States could or would complain of the above arrangement, and I feel certain that tho' a few would at first probably emigrate to Canada, they would not long remain there.

For many reasons which it would be tedious to your Lordship that I should detail, I would recommend that the presents to the visiting Indians should for the three years be delivered at the Manitoulin Island only.

The expense of forwarding the presents to that spot, tho' less than to the old place of delivery (Drummond Island) is greater than to Penetanguishene and Amherstburg,

> but as only those who are really in want of their presents would come to Manitoulin Island, we should gain, as indeed we did gain this year, by that arrangement infinitely more than the difference in the expense of transport. . . .
>
> Having disposed of at least one third of the Indian presents, and the expense of their delivery, I certainly respectfully recommend that we should continue to deliver them to those few Indians who continue to inhabit Upper Canada.
>
> I have already stated that the expense will shortly be defrayed altogether by the sale of the lands they have this year liberally surrendered to me; and even if that were not to be the case, I do think, that enjoying as we do possession of this noble Province, it is our bounden duty to consider as [illegible] the wreck of that simple-minded, illfated race, which (as I have already stated) is daily and yearly fading upon the progress of civilization.
>
> To have only to bear patiently with them for a short time, and with a few exceptions, principally half castes, their unhappy race beyond our power of redemption will be extinct.
>
> I am not prepared to recommend that money should be substituted for presents to the resident Indians in this province. –
>
> 1st. Because I think unless good arrangements were previously made, the Indians from their improvident habits, would in many places be left destitute, and
>
> 2ndly Because without due precaution, a money delivery to so many men, women and children, might possibly be attended with very great imposition.
>
> Another year's experience and reflection will I make no doubt, enable me to offer to your Lordship a decided opinion on this subject, as I am quite alive to the advantage which we should gain by the substitution of money, if it could be properly effected. . . .
>
> I am decidedly of opinion that at the expiration of three years, a still further reduction may be made in the Indian Department and that its expenses of every description will ere long be completely defrayed by the Lands which I have lately obtained from the Indians.[112]

Although Manitoulin Island never became the refuge Head envisioned, the related proposal to reduce and eliminate presents to "visiting Indians" from the United States was carried out, albeit on a different time frame. Head believed that the government should continue to deliver presents to "those few Indians who continue to inhabit Upper Canada"; however, it is important to emphasize that he also believed their numbers were "yearly fading."

In 1836, Head had "sufficiently hinted to [the Indians] to be clearly understood" that presents were to be discontinued. As early as June 1837, before the formal announcement of the impending discontinuation of presents, the Indian Superintendent at Sarnia, William Jones, reported that the news had "unsettled" the Indians.[113] Some were already making preparations to relocate to Canadian territory, although the Superintendent could not ascertain in what numbers.[114]

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[112] Sir F.B. Head to Lord Glenelg, November 20, 1836 (ICC Documents, pp. 1-21).

Events in the United States pushed more Indians into Canadian territory than Head had anticipated. Moreover, unforeseen circumstances meant that "visiting Indians" continued to receive presents until 1843. That extension, in theory at least, gave them six or seven years, rather than the intended two or three years, to make their decision.

Beyond the 1836 surrenders or treaties with the Ottawa, Chippewa, and Saugeen Indians that made Manitoulin Island and the Bruce Peninsula available, no formal land base was expressly established for any of the Indian allies who left the United States between 1836 and 1843. Relatively few of the immigrant Indians took up permanent settlement on Manitoulin Island. By 1862, Manitoulin Island was no longer exclusively reserved for Indians.[115]

Chief Superintendent Jarvis's Address, 1837

Head was unable to attend the August 1837 distribution of presents on Manitoulin Island owing to the death of King William IV in June of that year. The new Chief Superintendent of Indian Affairs, Samuel Peters Jarvis, therefore delivered the formal address explaining the government's decision to discontinue presents to Indians living in the United States. This he did on August 4, 1837, to a council of 75 principal Chiefs at Manitowaning on Manitoulin Island.[116] By then, "push had come to shove" across the border; the American government had decided to pay future annuities only to those Pottawatomi living in the United States west of the Mississippi River.[117]

After the distribution of presents to the 3700 Ottawa, Chippewa, Pottawatomi, Winnebago, and Menominee assembled at Manitowaning, Jarvis spoke.[118] It is not known which of the 75 principal Chiefs who heard Jarvis's speech may have been directly related to the present-day Moose Deer Point First Nation, since the names of only a few were recorded. Certainly, the Pottawatomi were represented. Eyewitness Anna Jameson identified at least one in her subsequent account, "a famous Pottowottomi chief and conjuror, called the Two Ears."[119] Also present were Chiefs Aisance and Yellowhead from Anderson's Coldwater civilization project.[120]

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[113] William Jones, Indian Superintendent, Sarnia, to Colonel James Givins, Chief Superintendent, June 6, 1837, NA, RG 10, vol. 66, pp. 63507-09, cited in "Pottawatomie Correspondence Collected by Franz Koennecke" (ICC Exhibit 15, p. 2).

[114] William Jones, Indian Superintendent, Sarnia, to Colonel James Givins, Chief Superintendent, June 6, 1837, NA, RG 10, vol. 66, pp. 63507-09, cited in "Pottawatomie Correspondence Collected by Franz Koennecke" (ICC Exhibit 15, p. 2).

[115] Surtees, *Treaty Research Report: The Manitoulin Treaties*, 39.

[116] Sir F.B. Head to Lord Glenelg, August 22, 1837, No. 41 in *British Parliamentary Papers*, vol. 12, "Correspondence, Returns and Other Papers Relating to Canada and the Indian Problem Therein, 1839" (Shannon: Irish University Press, undated) (ICC Exhibit 21, pp. 154-5); and Catherine A. Sims, "Algonkian-British Relations in the Upper Great Lakes Region: Gathering to Give and Receive Presents, 1815-1843," PhD thesis, University of Western Ontario, 1992, p. 314.

[117] Clifton, *A Place of Refuge* (ICC Exhibit 13, p. 32).

[118] Anna Brownell Jameson, *Winter Studies and Summer Rambles in Canada* (Toronto: McClelland & Stewart, 1990), 497, 499-501 [hereafter Jameson, *Winter Studies and Summer Rambles*] (ICC Exhibit 20).

Jarvis explained, through the Ottawa interpreter Assiginack (Assikenack),[121] that in three years presents would be given only to Indians living in the British Empire, and not to those resident in the United States. Indians living in the United States who wanted to continue receiving presents were invited to "come and live under the protection of your Great Father."[122] They were told he was "willing that his Red Children should all become permanent Settlers in this [Manitoulin]island."[123] In anticipation of these announcements, Anderson and his staff had started building the necessary agency buildings and houses at Manitowaning on Manitoulin Island in the spring of 1837.[124]

As recorded, Jarvis's words were as follows:

> Children,
>
> When your Great Father the Lieutenant Governor parted with his Red Children at this place he promised again to meet them here at the Council Fire, and witness in Person the grand Delivery of Presents now just finished.
>
> To fulfil this engagement your Great Father the Lieutenant Governor left his Residence at Toronto and proceeded on his Way to the Great Manitoulin Island as far as Lake Simcoe. At this place a messenger who had been despatched from Toronto overtook him, and informed him of the death of your Great Father on the other Side of the Great Salt Lake, *and the accession of the Queen Victoria*. It consequently became necessary for your Great Father the Lieutenant Governor to return to the seat of his Government, and hold a Council with his chief Men.
>
> Children, – Your Great Father the Lieutenant Governor has deputed me to express to you his Regret and Disappointment at being thus unexpectedly deprived of the Pleasure which he had promised to himself in again seeing all his Red Children, and

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[119] Jameson, *Winter Studies and Summer Rambles*, 500 (ICC Exhibit 20).

[120] Jameson, *Winter Studies and Summer Rambles*, 500 (ICC Exhibit 20).

[121] Jameson, *Winter Studies and Summer Rambles*, 499-502 (ICC Exhibit 20).

[122] Jameson, *Winter Studies and Summer Rambles*, 504 (ICC Exhibit 20); see also NA, RG 10, Records of Chief Superintendent's Office, Upper Canada, 1831-1847, vol. 66, pp. 63741-50.

[123] "Address of the Chief Superintendent of Indian Affairs to the Indians assembled in General Council at the Great Manitoulin Island," August 4, 1887, enclosed in Sir F.B. Head to Lord Glenelg, August 22, 1837, No. 41 in *British Parliamentary Papers*, vol. 12, "Correspondence, Returns and Other Papers Relating to Canada and the Indian Problem Therein, 1839" (Shannon: Irish University Press, undated) (ICC Exhibit 21, p. 156); see also Jameson, *Winter Studies and Summer Rambles*, 503 (ICC Exhibit 20); NA, RG 10, Records of Chief Superintendent's Office, Upper Canada, 1831-1847, vol. 66, pp. 63741-50.

[124] Mrs S. Rowe, "Anderson Record from 1699 to 1896" (1905) 6 Ontario Historical Society, *Papers and Records*, 131.

in taking by the Hand the Chiefs and Warriors of the numerous Tribes now here assembled.

Children, – I am now to communicate to you a Matter in which many of you are deeply interested. Listen with Attention, and bear well in Mind what I say to you.

Children, – Your Great Father the King has determined that Presents shall be continued to be given to all Indians resident in the Canadas; but Presents will be given to Indians residing in the United States only for Three Years, including the present Delivery.

Children, the Reasons why Presents will not be continued to the Indians residing in the United States I will explain to you.

1st. All our Countrymen who resided in the United States forfeited their Claim for Protection from the British Government from the Moment their Great Father the King lost Possession of that Country; consequently the Indians have no Right to expect that their Great Father will continue to them what he does not continue to his own White Children.

2d. The Indians of the United States who served in the late War have already received from the British Government more than has been received by the Soldiers of their Great Father who fought for him for Twenty Years.

3d. Among the Rules which civilized Nations are bound to attend to there is one which forbids your Great Father to give Arms and Ammunition to Indians of the United States who are fighting against the Government under which they live.

4th. The People of England have, through their Representatives in the Great Council of the Nation, uttered great Complaints at the Expense attendant upon a Continuation of the Expenditure of as large a Sum of Money for Indian Presents.

But, Children, let it be distinctly understood, that the British Government has not come to a Determination to cease to give Presents to the Indians of the United States. On the contrary, the Government of your Great Father will be most happy to do so, provided they live in the British Empire.

Therefore, although your Great Father is willing that his Red Children should all become permanent Settlers in this Island, it matters not in what Part of the British Empire they reside. They may go across the Great Salt Lake to the Country of their Great Father the King, and there reside and there receive their Presents, or they may remove into any part of the Provinces of Upper and Lower Canada, New Brunswick, Nova Scotia, or any other British Colony, and yet receive them; but they cannot and must not expect to receive them after the End of Three Years if they continue to reside within the Limits of the United States.

Children! – The Long Knives [Americans] have complained (and with justice too) that your Great Father, whilst he is at peace with them, has supplied his Red Children residing in their country, with whom the Long Knives are at war, with guns and powder and ball.

Children! – This, I repeat to you, is against the rules of civilised nations, and, if continued, will bring on war between your Great Father and the Long Knives.

Children! – You must therefore come and live under the protection of your Great Father, or lose the advantage which you have so long enjoyed, of annually receiving valuable presents from him.

Children, – I have one thing more to observe to you. There are many Clergymen constantly visiting you for the avowed Purpose of instructing you in Religious Principles. Listen to them with Attention when they talk to you on that Subject; but at the same Time keep always in view, and bear it well in your Minds, that they have nothing to do with your temporal Affairs.

Your Great Father who lives across the Great Salt Lake is your Guardian and Protector, and he only. He has relinquished his Claim to this large and beautiful Island on which we are assembled, in order that you may have a Home of your own quite separate from his White Children. The Soil is good, and the Waters which surround the Shores of this Island are abundantly supplied with the finest of Fish.

If you cultivate the Soil with only moderate Industry, and exert yourselves to obtain Fish, you can never want, and your Great Father will continue to bestow annually on all those who permanently reside here or in any Part of his Dominions valuable Presents, and will from Time to Time visit you at this Place to behold your Improvements.

Children, – Your Great Father the Lieutenant Governor, as a token of the above Declaration, transmits to the Indians a Silk British Flag, which represents the British Empire. Within this Flag, and immediately under the Symbol of the British Crown, are delineated a British Lion and a Beaver; by which is designated that the British People and the Indians, the former being represented by the Lion and the latter by the Beaver, are and will be alike regarded by their Sovereign so long as their Figures are represented on the British Flag, or in other Words, so long as they continue to inhabit the British Empire.

Children, – This Flag is now yours; but it is necessary that some One Tribe should take charge of it, in order that it may be exhibited in this Island on all occasions when your Great Father either visits or bestows Presents on his Red Children. Choose, therefore, from among you, the Tribe to which you are willing to entrust it for safe Keeping, and remember to have it with you when we next meet again at this place.

Children, – I bid you farewell; but before we part, let me express to you the high Satisfaction I feel at witnessing the quiet, sober, and orderly conduct which has prevailed in the Camp since my Arrival. There are assembled here upwards of 3,000 Persons, composed of different tribes; I have not seen or heard of any wrangling or quarrelling among you; I have not seen even One Man, Woman, or Child labouring under a State of Intoxication.

Children, – Let me entreat you to abstain from indulging in the Use of Firevater. Let me entreat you to return immediately to your respective Homes, with the Presents now in your possession. Let me warn you against Attempts that may be made by Traders or other Persons to induce you to part with your Presents in exchange for Articles of little Value.

Farewell.[125]

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[125] "Address of the Chief Superintendent of Indian Affairs to the Indians assembled in General Council at the Great Manitoulin Island," August 4, 1887, enclosed in Sir F.B. Head to Lord Glenelg, August 22, 1837 No. 41 in *British Parliamentary Papers*, vol. 12, "Correspondence, Returns and Other Papers Relating to Canda and the Indian Problem Therein, 1839" (Shannon: Irish University Press, undated) (ICC Exhibit 21, pp. 155-56); see also Jameson, *Winter Studies and Summer Rambles*, 502-05 (ICC Exhibit 20); NA, RG 10, Recods of Chief

Jarvis did not disclose the long-range intention "to dispense with such distributions in future," as alluded to by Head.[126] Rather, Jarvis emphasized the aspect of British protection: "Your Great Father who lives across the Great Salt Lake is your guardian and protector, and he only." Irrespective of what was being contemplated at the higher levels of officialdom, Jarvis left the impression that presents would be bestowed "annually" to any Indian allies in the United States who took up the invitation to relocate to the Canadas or other points in the British Empire within the prescribed time limit. He simply suggested they support themselves through agriculture and fishing.[127]

Given that the "present Delivery" made in 1837 was to count as one of the three years, then the government's original intention was that 1838 and 1839 would be the last two years that "visiting Indians" would receive presents. Even though the government was offering Manitoulin Island as a place for these potential immigrants to settle, they were not obliged to live there, as residence within the British Empire represented the only precondition to their continued receipt of annual presents.

This turn of events presented a dilemma for the "visiting Indians." Moving to Canada would deprive them of their share of the annuities for the lands they had ceded to the American government, annuities now available only west of the Mississippi River.[128] Staying in the United States would mean having to leave the Great Lakes area as well as giving up presents from the British.[129] Faced with this choice, hundreds decided to move to Upper Canada shortly after Jarvis's announcement.

Some 432 Pottawatomi living in the United States collected presents on Manitoulin Island in 1837, but none did so in 1838. In 1838, the 505 Pottawatomi who collected presents on Manitoulin – 406 from the Saugeen and

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Superintendent's Office, Upper Canada, 1831-1847, vol. 66, pp. 63741-50 and 63751-57; Memorandum on "Indian Presents," September 23, 1943, DIAND, Claims and Historical Research Centre, Item I-116 (ICC Documents, pp. 348-49). Emphasis added; the three italicized paragraphs were omitted from the second manuscript version (pp. 63751-57) and the version in the *British Parliamentary Papers*, but were included in the Jameson version (reproduced here) and the first manuscript version (pp. 63741-50).

[126] Sir F.B. Head to Lord Glenelg, November 20, 1836 (ICC Documents, pp. 1-21). The specific quotation is set forth at p. 9.

[127] "Address of the Chief Superintendent of Indian Affairs to the Indians assembled in General Council at the Great Manitoulin Island," August 4, 1887, enclosed in Sir F.B. Head to Lord Glenelg, August 22, 1837, No. 41 in *British Parliamentary Papers*, vol. 12, "Correspondence, Returns and Other Papers Relating to Canada and the Indian Problem Therein, 1839" (Shannon: Irish University Press, undated) (ICC Exhibit 21, p. 156).

[128] Pottawatomi in the United States participated in more than 50 treaties with the American government between 1800 and 1867. Clifton, "Potawatomi," in *Handbook of North American Indians*, vol. 15, 736 (ICC Exhibit 12).

[129] This statement, attributed to Superintendent T.G. Anderson in a letter written on December 20, 1839, is referred to in a memorandum entitled "Indian Presents," September 23, 1943, DIAND, Claims and Historical Research Centre, Item I-116 (ICC Documents, pp. 350-51). There is no indication on the face of the 1943 document of its author or its intended recipient.

the 99 from Penetanguishene – were counted as "resident Indians."[130] Overall, the number of "visiting Indians" who received annual presents at Manitoulin and Coldwater dropped from approximately 1800 in 1837 to fewer than 1000 in each of 1838 and 1839.

Difficulties with Head's Proposals

The delivery of presents to "visiting Indians" did not end in three years as Head had recommended in 1836. Moreover, Head's radical proposal to remove virtually all Indians to Manitoulin Island was not well received in any quarter. It enraged the local Methodist missionaries. It was opposed by the Aborigines Protection Society in England and the Executive Council of Lower Canada. Some Indians wanted to move to Manitoulin for their own reasons, but others were steadfastly opposed. Chippewa and Ottawa chiefs visiting Amherstburg from Indiana protested: "We have long ago given up attempting to cross the great waters in these frail bark canoes."[131]

No immediate action was taken on either of the contentious policy changes suggested by Head. Both risked disrupting the tried and true practice of Indian conciliation. Rebellions in Upper and Lower Canada in late 1837 and border raids by American Hunters' Lodges in the late 1830s were a greater concern. For the government, they produced an atmosphere of fear and uncertainty that precluded any action that would alienate Indian allies.[132] For some Indian allies the threats in late 1837 and through 1838 provided an opportunity to demonstrate their loyalty to the Crown.

In December 1837, 50 Pottawatomi and 40 Ojibwa from Lakes Huron and Simcoe volunteered to defend the Crown against rebels who were gathering north of Toronto. "Paroles" – reminders of earlier promises to return to the defence of the British Crown and not to take up arms against the British – were sent to the western Indians about the possible necessity of "unburying the hatchet." Although U.S. Indians who felt they had little to gain were less enthusiastic about these paroles than were those on Manitoulin Island,[133] there is evidence that Indian volunteers – perhaps including Ogemawahj, the Pottawatomi ancestor of the Moose Deer Point First Nation – were paid for their military service in 1839.[134]

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[130] Catherine A. Sims, "Algonkian-British Relations in the Upper Great Lakes Region: Gathering to Give and Receive Presents, 1815-1843," PhD thesis, University of Western Ontario, 1992, pp. 334-35.

[131] James A. Clifton, "'Visiting Indians' in Canada," manuscript for Parks Canada booklet, 1979 (ICC Exhibit 11, pp. 20-21). By 1836, south of the Great Lakes, many preferred to travel by horse rather than canoe. "Visiting Indians" bound for Amherstburg via the Old Sauk Trail from Chicago were being ferried across the Detroit River to Amherstburg with their horses.

[132] John Leslie, "Commissions of Inquiry into Indian Affairs in the Canadas, 1828-1858: Evolving a Corporate Memory for the Indian Department," MA research essay, Carleton University, 1984. The 1837 Rebellion in Upper Canada had challenged the Tory Family Compact, with which many Indian Affairs officials were associated. The Hunters' Lodges were secret societies devoted to liberating the Canadas from Britain.

[133] Catherine A. Sims, "Algonkian-British Relations in the Upper Great Lakes Region: Gathering to Give and Receive Presents, 1815-1843," PhD thesis, University of Western Ontario, 1992, pp. 327-30 and fn 93, p. 340.

When Sir George Arthur replaced Head in March 1838, Jarvis sought instructions from the new Lieutenant Governor before distributing presents at Manitoulin in August that year. Jarvis explained to Arthur:

> I was instructed by Sir Francis Head, in August 1837, to apprise . . . the visiting Indians, residing in the United States Territory, that it was not the intention of Government to bestow presents on them, after the year 1838, unless they became permanent residents within the limits of Upper Canada or some portion of Her Majesty's dominion.[135]

Evidently Jarvis was not directed to repeat the announcement. He made no mention of it at the 1838 distribution. Instead, he acknowledged the government's problems, praised the loyalty of resident Pottawatomi and Ojibwa who had volunteered to suppress the 1837 uprisings, and promised that the Great Mother would never forget the conduct of her Indian warriors.[136]

Jarvis had some misgivings of his own about discontinuing the presents:

> I was directed to communicate to the Visiting Indians residing within the Territory of the United States in 1837 by order of Sir Francis Head . . . that at the expiration of Three Years, including the Year 1839, Presents would be discontinued to Indians residing in the United States unless they removed to some part of the dominion of Her Britannic Majesty. The policy of this step, has always appeared to me very questionable and the justness of it still more so.
>
> The Indians generally residing within the American Territory consider themselves the allies of Great Britain and many of them as owing allegiance to the Crown. This was eminently manifested during the American War in 1812 & 13.
>
> The hostile feeling entertained by every Tribe residing in the United States toward the Government of that Country renders it in my opinion extremely impolitic just at

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[134] January 15, 1839, Paylist of £559.44.4 Army Sterling to three Officers (for 67 days) and 48 Chiefs and Warriors (for 61 days) being "Chippewa of Lakes Huron and Simcoe" assembled at Holland Landing from November 1838 to January 1839 and "employed, on Her Majesty's Service" "under the authority of His Excellency the Lieutenant Governor dated November 10, 1838," NA, RG 10, vol. 70, pp. 65312-15 (ICC Exhibit 23). The list includes a Pottawatomi shown as "Okemauwatch" and three others with similar names.

[135] S.P. Jarvis, Chief Superintendent of Indian Affairs, to John MacAulay, July 21, 1838, NA, RG 10, C-11023, vol. 68, pp. 64646-47, cited in "Pottawatomie Correspondence Collected by Franz Koennecke" (ICC Exhibit 15, p. 3). It is apparent that 1838 would have been the third year only if 1836 was counted as the first year. Otherwise, if counting from 1837, the third and last year of giving presents to "visiting Indians" would have been 1839. This error was corrected in Jarvis's August 25, 1838, letter to Macaulay, in which Jarvis stated that, "at the expiration of Three Years, including the Year 1839, Presents would be discontinued to Indians residing in the United States unless they removed within some part of the dominion of Her Britannic Majesty."

[136] Catherine A. Sims, "Algonkian-British Relations in the Upper Great Lakes Region: Gathering to Give and Receive Presents, 1815-1843," PhD thesis, University of Western Ontario, 1992, p. 338.

> this crisis, to deprive them of a Boon which they have enjoyed from the British Government, I believe since the peace of 1783.
>
> But a stronger argument in favour of continuing Presents to them is the circumstance, that British Faith has been pledged to that effect.[137]

Presents were given to "visiting Indians" for a few more years, but the Indian Department did not develop any new strategies in that time.

In the summer of 1838, Colonial Secretary Lord Glenelg directed Lieutenant Governor Arthur to revert to the civilization plan initiated in 1830. "Wandering Indians" were to settle and become farmers, missionaries were to be encouraged to educate them, and reserve lands were to be protected.[138] The "civilization" program was less than vigorous, however, because Indian superintendents were overworked and lacked staff.[139]

Once Head was out of office, the plan to remove Indians to Manitoulin Island lost momentum, even though the Assistant Indian Superintendent at Sarnia, J.W. Keating, worked hard to overcome the Indians' resistance to moving there. Dealing with an influx of Indians from the United States in the spring of 1839, Keating wrote to Jarvis:

> I am sorry to say that the Americans & I dare say some others have been tempering [sic] with the Indians & produced in some a disinclination to go; by informing them that they could get no leather for mocassins & that the inhabitants of [Manitoulin] Island were in a state of starvation. This I of course fully contradicted, & gave them an account of the Island such as I had seen it, & of the splendid fall fisheries in the immediate neighbourhood of Manitowaning . . . .
>
> After a considerable degree of hesitation & upon our positive assurance, that they could neither recur [sic] land to settle on here, or encouragement or assistance of any description from government unless they proceeded to Manitowaning they have decided to go.[140]

Simultaneously, the Indians were making arrangements to settle elsewhere. Keating's superior at Sarnia, William Jones, informed Jarvis in November

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[137] S.P. Jarvis, Chief Superintendent, to John MacAulay, August 25, 1838, NA, RG 10, C-11023, vol. 69, pp. 64708-09, 64714-16, and 64727-29, cited in "Pottawatomie Correspondence Collected by Franz Koennecke" (ICC Exhibit 15, p. 4); cited in Catherine A. Sims, "Algonkian-British Relations in the Upper Great Lakes Region: Gathering to Give and Receive Presents, 1815-1843," PhD thesis, University of Western Ontario, 1992, pp. 339-40, as Jarvis to Macaulay, August 25, 1838, NA, RG 10, vol. 502, p. 126.

[138] John Leslie, "Commissions of Inquiry into Indian Affairs in the Canadas, 1828-1858: Evolving a Corporate Memory for the Indian Department," MA research essay, Carleton University, 1984, pp. 48-49.

[139] John Leslie, "The Bagot Commission: Developing a Corporate Memory for the Indian Department," unpublished paper for Canadian Historical Association annual meeting, June 1982, p. 9.

[140] J.W. Keating, Assistant Indian Superintendent, Sarnia, to Colonel S.P. Jarvis, Chief Superintendent, June 29, 1839, NA, RG 10, C-11024, vol. 70, pp. 65851-54, cited in "Pottawatomie Correspondence Collected by Franz Koennecke" (ICC Exhibit 15, p. 6).

1839 that a band of Pottawatomi had "held a Council with the Chiefs on Walpole Island, from whom they received a Tract of land on the Chenail Ecart, to which they have repaired." It appeared to Jones that others were intending to go there as well.[141]

With respect to questions from the Lieutenant Governor and Colonial Secretary regarding the Indians' attitudes towards government policy, Jarvis referred these queries to Indian Superintendent Anderson at Manitoulin Island. Anderson replied that both "the Indians resident on the Island as well as the visitors" were "much pleased" by the formation of the establishment at Manitowaning, but were "slow" to take advantage of it owing to fears, encouraged by the Americans, that they might be dispossessed of these lands in the future. He added that, while the "visiting Indians" considered it a "very great hardship" to have presents discontinued unless they became resident in Canada, many did "prefer losing their [U.S.] Land payments for the Known Certainty of receiving Presents [in Canadian territory]."[142]

Indians from the United States congregated on the Canadian side of the St Clair River, which connects Walpole Island in Lake St Clair with the southern tip of Lake Huron at Sarnia. When the Indians refused to go to Manitoulin Island, Jarvis directed that they be persuaded by telling them that no agricultural assistance would be given to them elsewhere:

> I am extremely sorry to learn that they shew a reluctance to proceed to Manitoulin. They must not expect to be assisted by Government unless they do go there. [T]hat . . . Establishment has been formed at very great expense and upon an extensive scale for the relief and accommodation of such Indians as may not have fixed residences and who are desirous of being civilized and assimilating their habits to those of white men. . . .
>
> I wish therefore that you would distinctly give them to understand that at this Station [Manitoulin] alone will they be assisted by the Government in the cultivation of the soil, and that it is the earnest wish of the Government that they should take up their residence at that place under Captain Anderson.[143]

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[141] William Jones, Indian Superintendent, Sarnia, to Colonel S.P. Jarvis, Chief Superintendent, November 12, 1839, NA, RG 10, C-11025, vol. 71, pp. 66422-24, cited in "Pottawatomie Correspondence Collected by Franz Koennecke" (ICC Exhibit 15, p. 8).

[142] Thomas G. Anderson, Indian Superintendent, Manitoulin Island, to S.B. Harrison, Secretary, Indian Department, July 18 or August 20, 1839, NA, RG 10, C-11025, vol. 71, pp. 66078 and 66087, cited in "Pottawatomie Correspondence Collected by Franz Koennecke" (ICC Exhibit 15, p. 7).

[143] S.P. Jarvis, Chief Superintendent, to unknown ["probably either J.W. Keating, Walpole Island, or Wm. Jones, St. Clair"], May 9, 1840, NA, RG 10, C-11026, vol. 73, pp. 67704-06, cited in "Pottawatomie Correspondence Collected by Franz Koennecke" (ICC Exhibit 15, pp. 9-10).

At Sarnia, the frustrated Keating did not feel obliged to provide for Indians who had moved there. In June 1840, he intimated to Jarvis that he thought they could be manipulated by harsh treatment:

> [I]t will only be when they find themselves naked & hungry which they will in a year or so that they will succumb. That will I think be the best way of proceeding. [L]et . . . them suffer, & want presents & they will become tractable and plastic enough.[144]

Keating expected that, by the spring of 1841, he would be able to transport Pottawatomi from Walpole Island to Manitoulin Island by boat, with the expense paid by the sale of their horses.[145]

The decade of the 1840s marked a new era in Canadian politics. In October 1840, soon after the *Union Act* laid the groundwork for the union of Upper and Lower Canada, the Lieutenant Governor informed Jarvis that he did not want any means being used to "induce or encourage Indians to come into the Country."[146] By February 1841, Upper Canada ceased to be a separate entity and was subsumed under the United Province of Canada.[147] In March 1841, Civil Secretary T.W. Murdoch informed Jarvis that Indians from the United States would have to relocate to British North America before the 1843 present distribution if they wished to continue receiving them.[148] Murdoch not only reinstituted a deadline for giving presents to "visiting Indians" but probably hoped to stem Indian immigration from the United States at the same time.

Jarvis was still not in favour of ending the practice. He pointed out that the guarantee of "Her Majesty's bounty" went back to William and John Johnson, "and especially" to Sir George Prevost's March 17, 1814, council of western Chiefs whose possessions were "within the Royal Standard at the declaration of the War of 1812." Jarvis knew these Indian allies had been promised that the King would not forget them in peace.[149] Given the willingness of the Indians to oppose the rebels during 1837 and 1838, Jarvis also believed that resident Indians, as well as "visiting Indians" from the United States, remained committed to the defence of the Crown, and that their services entitled them to presents.[150]

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[144] J.W. Keating, Indian Superintendent, Sutherlands, to S.P. Jarvis, Chief Superintendent, June 22, 1840, NA, RG 10, vol. 73, pp. 67819-20, cited in "Pottawatomie Correspondence Collected by Franz Koennecke" (ICC Exhibit 15, p. 11).

[145] J.W. Keating, Indian Superintendent, Sutherlands, to S.P. Jarvis, Chief Superintendent, July 4, 1840, NA, RG 10, C-11026, vol. 74, pp. 67908-11, cited in "Pottawatomie Correspondence Collected by Franz Koennecke" (ICC Exhibit 15, p. 12). The evidence before the Commission does not disclose whether this transfer actually occurred in 1841.

[146] S.B. Harrison, Secretary, Indian Department, to S.P. Jarvis, Chief Superintendent, October 2, 1840, NA, RG 10, C-11026, vol. 75, pp. 68287-88, cited in "Pottawatomie Correspondence Collected by Franz Koennecke" (ICC Exhibit 15, p. 12).

[147] Frederick H. Armstrong, *Handbook of Upper Canadian Chronology* (Toronto: Dundurn Press, 1985), 36.

[148] Catherine A. Sims, "Algonkian-British Relations in the Upper Great Lakes Region: Gathering to Give and Receive Presents, 1815-1843," PhD thesis, University of Western Ontario, 1992, p. 393.

However, the greater peace that prevailed after Union in 1841 made the discontinuance of presents more feasible for the British. His own concerns notwithstanding, Jarvis directed Anderson and the other superintendents in December 1841 to inform as many Indians as possible that non-residents would get no presents after 1843. Jarvis expected the Indians to spread the word to their friends and relatives in the United States. By the end of December, Jarvis reported that this news had been communicated to all the Indian tribes resident in western Canada. By January 1842, Jarvis was prepared to agree that the time had arrived "when in justice to the Government as well as to the Indian the line of distinction should be drawn and made known as to what Indians are or are not in future to share Her Majesty's Bounty."[151]

In 1842, the Bagot Commission began its investigation of the Indian Department. Concerned with the efficiency and cost effectiveness of the civilization program, the Bagot Commissioners suggested a plan to limit presents immediately. The plan involved taking a census of all resident Indians to ensure that only those on official band lists would receive presents. The Governor General would be required to authorize any additions to the lists. "Halfbreeds" and their descendants would not be included unless they were adopted by the tribe with which they lived, and Indian women living with or married to white men would be excluded. Wherever feasible, the nature of the presents would be in keeping with agricultural pursuits.[152]

No such census was taken. "Visiting Indians" continued to receive presents, although on a smaller scale, through to 1843. The distribution of ammunition was reduced in favour of distributing more "practical" presents.[153]

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[149] Catherine A. Sims, "Algonkian-British Relations in the Upper Great Lakes Region: Gathering to Give and Receive Presents, 1815-1843," PhD thesis, University of Western Ontario, 1992, pp. 393-95.

[150] Catherine A. Sims, "Algonkian-British Relations in the Upper Great Lakes Region: Gathering to Give and Receive Presents, 1815-1843," PhD thesis, University of Western Ontario, 1992, pp. 393-95.

[151] Catherine A. Sims, "Algonkian-British Relations in the Upper Great Lakes Region: Gathering to Give and Receive Presents, 1815-1843," PhD thesis, University of Western Ontario, 1992, pp. 395-96.

[152] John Leslie, "Commissions of Inquiry into Indian Affairs in the Canadas, 1828-1858: Evolving a Corporate Memory for the Indian Department," MA research essay, Carleton University, 1984, pp. 90-92.

[153] John Leslie, "Commissions of Inquiry into Indian Affairs in the Canadas, 1828-1858: Evolving a Corporate Memory for the Indian Department," MA research essay, Carleton University, 1984, p. 104.

When "visiting Indians" received presents for the last time on Manitoulin Island in 1843, there was no public speech. Jarvis did not attend, nor was there a general distribution of presents. Instead, the effective head of the Bagot Commission, R.W. Rawson, and the new Governor General, Charles T. Metcalfe (appointed in 1843), directed Superintendent Anderson to inform groups of "visiting Indians" individually that they would no longer be receiving presents. Adopting the civilized life was to be recommended as the only means by which the Indians might continue to provide for their families. Nevertheless, the Indians were to be reassured that the government would "ever feel a lively interest in their welfare and the advancement of all the Indian tribes on the continent." Rawson ordered Anderson to give visiting chiefs a tour of Manitowaning to demonstrate the "beneficial change which had taken place in the condition of their brethren." By then there were approximately 1100 Indian residents at Manitowaning.[154]

Government officials consistently concealed the government's desire to do away with all presents. A decade after the elimination of presents to "visiting Indians," around 1853 or 1854, presents to resident Indians began decreasing. There had been no warning of this reduction in Head's address of 1836, in Jarvis's announcement in 1837, or in the Superintendents' "announcements" of 1841 and 1843.

In 1844, the Bagot Commission report suggested terminating annual presents to all resident Indians. At least one historian suggests this was not done during the 1840s "owing to Indian opposition and increased international tensions involving the dispute over the Oregon boundary."[155] In July 1850, Colonial Secretary Earl Grey wrote to the Governor General, Lord Elgin, to warn him that the House of Commons intended to discontinue any funding related to annual presents. In a report prepared to determine the least objectionable way to end the presents, Lord Elgin proposed that they first be curtailed to the more "advanced" or "civilized" tribes, with those still dependent on hunting and fishing to be given more time to prepare for their termination. The Colonial Secretary's March 1851 response to this report was that presents had to be progressively reduced from 1852 until complete abolition in 1858.[156]

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[154] Catherine A. Sims, "Algonkian-British Relations in the Upper Great Lakes Region: Gathering to Give and Receive Presents, 1815-1843," PhD thesis, University of Western Ontario, 1992, pp. 400-02.

[155] John Leslie, "Commissions of Inquiry into Indian Affairs in the Canadas, 1828-1858: Evolving a Corporate Memory for the Indian Department," MA research essay, Carleton University, 1984, p. 104.

[156] John Leslie, "Commissions of Inquiry into Indian Affairs in the Canadas, 1828-1858: Evolving a Corporate Memory for the Indian Department," MA research essay, Carleton University, 1984, pp. 130-32.

Ottawa Chief Assiginack, who had been the interpreter for Head's 1836 address, learned of the impending discontinuation of presents to resident Indians around 1851. In protesting the proposal, Assiginack recounted the history of the 1837 council and concluded that presents could not end unless the bright sun of the British Empire fell into moral decay.[157]

In 1852, Ogemawahj (specifically referred to as "a Potawatomie"), Chief Aisance (formerly of Coldwater), and about a dozen other Chiefs were informed by Anderson that presents to resident Indians would soon be ending. Anderson held meetings at Penetanguishene and several other locations to convey the news. In these speeches, he characterized the giving of presents as a form of charity and avoided making any connection between presents and military service in the British interest:

> My Brethern [sic],
> When I last met you in Council I told you the period was near at hand when you would get no more Presents. I did not know at that time that the day was so near, but the time has arrived and this is the last day (year) that Your Great Mother's Blankets will be issued to you.
>
> My B[rethern],
> I hold in my hand a letter which contains the information on the subject (The Hon^{ble} the Superintendent General's letter dated "Quebec 8 July 1852") which I am commanded to communicate to you and which I shall endeavor to make you understand, if however there should be any part of it that you do not comprehend, ask me about it and I will tell you.
>
> My B[rethern],
> This letter informs you that your Great Mother's Councillors had considered the subject of the Indian Presents; that after many days (years) serious thought about the matter they have concluded that this shall be the last time this bounty shall be distributed to the settled Indians in Upper Canada.
>
> My B[rethern],
> Presents were first given to the Indians when they were poor and could not support themselves – the Government saw their situation – took pity on them – were charitable to them and kindly gave them Clothing. But now that many of you have become Farmers, have annuities, plenty of Land, pay no Taxes and are well able to work, your Great Mother's wise men consider it unjust that the white men living beyond the Great Salt Lake should any longer pay money to buy Goods for the Indians who are so much better provided for than many of your Great Mother's white children.

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[157] James A. Clifton, "Visiting Indians in Canada," manuscript for a Parks Canada booklet, 1979 (ICC Exhibit 11, pp. 40-41).

My B[rethern],
You know that all Game is fled from your grasp. You cannot live by the Chase. You must therefore go to work and cultivate the soil like white men. With your industry, your annuities and the interest arising from the sale of land, if managed with care, you will have abundance of every thing and will not feel the want of the Presents. But if any of you frequent the Fire-Water shops and will not work, such, like white men who live in the same way, must expect to be poor and wretched in the world and forever miserable in the [illegible] to come.

My B[rethren],
Your Great Father is rejoiced to hear that many of your people are becoming good workers and would regret to learn that any, either from indolence, [illegible] or any other neglect of their duty, should allow their wives or children to suffer from the want of those comforts which industrious conduct could so easily provide for them.

My B[rethren],
I have told you that this is the last time you will receive Blankets from the Gov[ern]m[en]t and to show you with how much care it has considered your interest I now tell you that next year, three fourths of the value of the Presents will be paid in money, that is to say, the amount will be added to your annuities respectively and apply in the same way that your annuities are. The year after only one half will be allowed you, and the following, being the last year only one fourth, and thus will end what is called Indian Presents. The Government, my friends, have adopted this humane mode of putting an end, by degrees, to the gratuity which you and your fathers have received for nearly a hundred years merely out of charity because you were not able to clothe yourselves.

My B[rethren],
You must not suppose that because you are not to receive any more Presents that the Government casts you off and will take no more care of you, for I am strictly commanded to tell you that they will continue to take a deep interest in your welfare, will continue to be your advisers, to conduct the expenditure of your funds, and in fact do everything that is just and reasonable to promote your happiness and particularly as regards your advancement in the arts of civilized life.

My B[rethren],
For more than twenty years the Government have addressed you through me, exhorting you and advising you to adopt the customs of your white brethern [sic]around you to cultivate the soil and by other habits of manly labour to support your families in comfort, to live like good Christians and to get your children educated. Had you followed this good and friendly advice you would now have large farms producing abundant crops, and many of your young men and women would be respectable members of society. But instead of taking this good advice, you have listened to those people who wish to get your money for their Fire-Water, and to keep you hunting muskrats to make a profit by their trade, not caring to what state of wretchedness they may reduce you.

> My B[rethren],
> And now let me ask, what do you intend to do? You have good annuities it is true, but if you continue idle they are not sufficient to provide all your people with food and clothing. Throw off indolent habits, turn to the plough and work like men. Send your children to the Big School where they will be taught every thing that is good for them. Follow the advice of your Great Father and assemble yourselves together into large communities, where he will give you good Land where you may prepare farms to leave for your children when you leave this world. Do not continue to live in small bands, nor think of going to settle on Islands, for depend upon it, Your Great Father will not encourage your doing either. Go then at once to such place as he may direct so that your interest may be better attended to.
>
> My B[rethren],
> In old times when your ancestors were about to leave this world for the land of spirits, they could call their children about them and say, "My children, I am leaving you and am going to the land where by fathers are gone. Be not greived [sic], I leave you plenty to support you and your children. These are my Rivers and my hunting ground full of Game. There is my Bow and arrows, my canoe and my spear, all I have I leave to you, take good care of them, use them with diligence and you will have all you want for the comfort of your families."
>
> My B[rethren],
> You have no Rivers, no hunting grounds to leave to your children. What do you intend to do for them? You love your children as your ancestors loved theirs. What do you intend to leave for them to live upon when you are gone? If you do not wish them to prowl about like wolves and foxes for food, you must go to work and prepare farms for them, and in the meantime send them to the Big Schools to be educated.
>
> My B[rethren],
> Reflect seriously on what I have said and recollect, I again repeat it, that Your Great Father will not encourage your remaining in small bands, nor will he help you to settle on any Island unless it be the Great Manitoulin.[158]

Chief Aisance was the first to reply after Anderson spoke at Penetanguishene. He accepted discontinuation of the presents in principle, but thought it should be put off for another generation and a half:

> Father,
> I tell you the Government promised our forefathers that they would receive presents for three Generations. Only one generation has passed away and I am not yet in the prime of life and the Presents should continue to be given for one more generation and a half.

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[158] "Address of T.G. Anderson, Superintendent of Indian [A]ffairs[,] to the Chippewa, Potawatimie and Mohawk Indians under his Superintendence on the occasion of his making the last issue of Presents to be made to the settled Indians in Upper Canada," September 27, 1852, NA, RG 10, vol. 268, pp. 163974-78 (ICC Exhibit 22).

> Father,
> It is only four years since we began to send our Children to the Big School to be instructed and we think the Government ought to continue giving Presents until our Children are well instructed. . . .
>
> Father,
> The Indians are yet poor and there are many widows and orphans among us who are not able to clothe themselves and buy other things they cannot do without.[159]

Although bands receiving treaty annuities seemed quite prepared to accept the eventual discontinuation of presents to resident Indians, Ogemawahj was not. Speaking to Anderson at Penetanguishene, Ogemawahj pointed out that the circumstances of his people were different. Remembering the pledges of the British, he pleaded the disadvantaged status of his people:

> Father,
> We, Potawatomies are poor. We do not receive annuities, we don't know how we can provide clothing for our families when we get no more Presents. This we wish our Great Father to know.
>
> Father,
> We say again and we wish our Great Father to hear it, we have nothing to depend upon for a living, and hope he will continue to give us this bounty as he told our fathers he would do. He said he would continue to give us Presents as long as the sun should appear in the sky.[160]

Present-giving was wholly discontinued in or by 1858, two years after the 1856 transfer of Crown lands from imperial to Canadian control.[161] The action appears to have been taken largely without reference to pledges made in wartime or to inconsistencies in how various groups of Indians would be affected by the change.

Most of Manitoulin Island was opened to non-native settlement by surrender of the "Chiefs and Principal Men of the Ottawa, Chippewa and other Indians occupying the said Island" on October 6, 1862.[162] The surrender cited the 1836 surrender arranged by Head, but pointed out that "few Indians from the mainland, who it was intended to transfer to the island, have ever come to reside thereon."[163] For the government, the Manitowaning establishment had been a disappointing experiment:

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[159] "Address of T.G. Anderson, Superintendent of Indian [A]ffairs[,] to the Chippewa, Potawatimie and Mohawk Indians under his Superintendence on the occasion of his making the last issue of Presents to be made to the settled Indians in Upper Canada," September 27, 1852, NA, RG 10, vol. 268, p. 163979 (ICC Exhibit 22).

[160] "Address of T.G. Anderson, Superintendent of Indian [A]ffairs[,] to the Chippewa, Potawatimie and Mohawk Indians under his Superintendence on the occasion of his making the last issue of Presents to be made to the settled Indians in Upper Canada," September 27, 1852, NA, RG 10, vol. 268, p. 163980 (ICC Exhibit 22).

[161] Memorandum entitled "Indian Presents," September 23, 1943, DIAND, Claims and Historical Research Centre, Item I-116 (ICC Documents, pp. 350-51); James A. Clifton, "'Visiting Indians' in Canada," manuscript for Parks Canada booklet, 1979 (ICC Exhibit 11, p. 40); Clifton, *A Place of Refuge* (ICC Exhibit 13, p. 90).

[162] James Clifton, "A Report on a Survey of Potawatomi Indian Groups in Canada," July 24, 1973 (ICC Exhibit 14, p. 6); Surtees, *Treaty Research Report: The Manitoulin Treaties*.

> It was hoped that substantial numbers of Indians from the rest of the province, but particularly from Saugeen and the north shore [of] Lake Huron, would settle near Manitowaning in order to receive the assistance of the Department personnel. As they made progress, they would offer a concrete example to other bands who, it was felt, would want to emulate their success.[164]

For various reasons, including the relative remoteness of Manitoulin Island and minimal agricultural success, the Indian population of the Island was just 1200 in 1858.[165] Some Indian residents had left the Island to join other bands. Agency buildings and the school at Manitowaning were in a "ruinous" state of disrepair, and the nearby farms were being neglected.[166]

MIGRATION TO CANADA AND THE AFTERMATH

Pottawatomi Immigration/Migration from 1837

During the 1830s and 1840s, some 5000 to 9000 "visiting Indians" eventually moved from American to Canadian territory. Most were Ojibwa, Ottawa, and Pottawatomi, but there were also smaller numbers of Shawnee, Winnebago, Sauk, and Menominee. The addition of so many Indians was more than the government had anticipated, even though the population of the province underwent a sixfold increase from 158,000 in 1825 to 952,000 in 1852.[167]

Anthropologist James Clifton's view is that American Indian policy was a great influence on the decision of Indians in the United States to move to Canada:

> The end of presents itself contributed to their immigration, as did the invitation to take up residence in Canada. However, the major force was the American Removal Policy which threatened to force the Great Lakes Indians west onto the dry prairie

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[163] Surtees, *Treaty Research Report: The Manitoulin Treaties*, 39.
[164] Surtees, *Treaty Research Report: The Manitoulin Treaties*, 16.
[165] Surtees, *Treaty Research Report: The Manitoulin Treaties*, 16.
[166] Surtees, *Treaty Research Report: The Manitoulin Treaties*, 18-19.
[167] R. Louis Gentilcore, ed., *Historical Atlas of Canada*, Volume II: *The Land Transformed, 1800-1891* (Toronto: University of Toronto Press, 1987), plate 10.

> lands. Many of the tribes adjacent to the border then saw Canada as a refuge and some took advantage of the invitation to evade the full impact of American policy.[168]

After about 1840, or until they became settled, many immigrant Pottawatomi formerly known to the Indian Department as "western" or "visiting Indians" were reclassified as "wandering Indians," since they lacked reserves in Canada.[169] Competition for a shrinking land base forced some Pottawatomi to move frequently.[170] Many Pottawatomi married in, were adopted in, or simply moved in with Ojibwa (Chippewa) and Ottawa who had reserves and treaty rights. This merging occurred both before and after the creation of reserves resulting from various surrenders and treaties made mainly between 1815 and 1850.[171] These immigrants' descendants are now associated with most of the small reserves located along the east coast of Lake Huron from Lake St Clair to north of Manitoulin Island.[172]

Given that "visiting Indians" received presents until 1843, it is probably impossible to identify the precise moment when certain Moose Deer Point ancestors crossed over into Canadian territory with the intent of settling permanently, as opposed to simply collecting annual presents.[173] The First Nation's written submission concedes that there is "conflicting evidence" as to the dates of the migration of the Pottawatomi ancestors named Waucosh (Williams) and Winamek (Isaac). A Winamek fought with Tecumseh, and someone by this name died in a battle in the Detroit-Amherstburg area. Nor is it known when the ancestors of the Newganub (Sandy) family came, although Newganub was the name of an Ottawa chief from a village near Chicago.[174] The source for saying that the "Aubey family came in 1837" is likewise unclear. However, it is submitted that their predecessors, the ancestors of the Moose Deer Point First Nation, lived with and perhaps were even members of the Coldwater, Parry Island, Beausoleil, and Christian Island Bands.[175] As will be seen below, in affidavits and applications for membership in the Beausoleil Band in 1912, some of the Pottawatomi stated that they or their predecessors had received "annuities" from Anderson at Penetanguishene with the Beausoleil Band and that Ogemawahj was the first settler on Christian Island.[176]

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[168] James A. Clifton, "Visiting Indians in Canada," manuscript for a Parks Canada booklet, 1979 (ICC Exhibit 11, pp. 43-44).

[169] Clifton, *A Place of Refuge* (ICC Exhibit 13, pp. 34-36).

[170] Clifton, *A Place of Refuge* (ICC Exhibit 13, p. 90). Clifton cites S.P. Jarvis to William Rawson, October 18, 1843, "RG 10, vol. 7, pp. 196-2a."

[171] Clifton, *A Place of Refuge* (ICC Exhibit 13, pp. 90-91).

[172] James A. Clifton, "'Visiting Indians' in Canada," manuscript for Parks Canada booklet, 1979 (ICC Exhibit 11, p. 44).

[173] Memorandum entitled "Indian Presents," September 23, 1943, DIAND, Claims and Historical Research Centre, Item I-116 (ICC Documents, p. 351); James A. Clifton, "'Visiting Indians' in Canada," manuscript for Parks Canada booklet, 1979 (ICC Exhibit 11, pp. 40 and 43); Clifton, *A Place of Refuge* (ICC Exhibit 13, pp. 90-91).

[174] Written Submission on Behalf of Moose Deer Point First Nation, August 1, 1997, pp. 46-49, citing Dr Ian V.B. Johnson, "Moose Deer Point Claim," October 1993 (ICC Documents, pp. 366-67 and 369-70).

[175] Written Submission on Behalf of Moose Deer Point First Nation, August 1, 1997, pp. 46-49.

Among the Chippewa of Saugeen who surrendered their territory on August 9, 1836, were some Pottawatomi.[177] Since no officer of the government had visited them between 1837 and the early 1840s, when the Bagot Commission undertook its investigations, Jarvis could not give an accurate account of their settlement except to say that the people receiving annuities were mostly Wesleyan Methodists.[178] Clifton's work mentions a village of about 370 Pottawatomi at the base of the Bruce Peninsula by 1838. They had gardens and they hunted and fished, but, in 1838, "depredations on the whites in the vicinity of Goderich" (to the south along the shore of Lake Huron) were attributed by Jarvis to "transient" Pottawatomi from that village.[179] In 1855, officials described the group at that location as "indolent and improvident."[180]

Anderson noted in August and November 1837 that 432 Pottawatomi from "Millwackie" (Milwaukee), some of whom were already clearing land on Manitoulin for the next year, were planning to remain in Canada, while 218 Pottawatomi were wintering at the Saugeen.[181] In 1842, presents were distributed to 319 Chippewa and 507 Pottawatomi, Ottawa, and American Indians at Walpole Island, a settlement established in 1782 for Chippewa loyalists.[182] Anderson reported a small band of Pottawatomi living near the Chippewa on Beausoleil Island in 1845.[183]

The lack of a land base for the Pottawatomi was clearly a problem from the beginning, but there was no official will to rectify the situation. Early reports simply deplored the Pottawatomi's wandering, begging, drinking, and fighting.[184] An 1844-45 government report commented that "their arrival in the Province is in every respect to be regretted."[185]

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[176] 1912 Applications from 17 or more non-treaty Indians (ICC Documents, pp. 126-92).

[177] Sir Charles Bagot, "Report on the Affairs of Indians in Canada," March 20, 1845 (ICC Documents, p. 29).

[178] Sir Charles Bagot, "Report on the Affairs of Indians in Canada," March 20, 1845 (ICC Documents, p. 29).

[179] Clifton, *A Place of Refuge* (ICC Exhibit 13, p. 90). Clifton cites "MacCauley's Report, 1839, [NA,] RG 10, vol. 718."

[180] Clifton, *A Place of Refuge* (ICC Exhibit 13, p. 90). Clifton cites "Report of the Special Commissioners to Investigate Indian Affairs in Canada, Sessional Papers, 1858."

[181] Clifton, *A Place of Refuge* (ICC Exhibit 13, p. 68); T.G. Anderson, Indian Superintendent, Manitowaning, "Return of Indians who Received Presents at Manatowauning in August, 1837," August 8, 1837, NA, RG 10, C-11023, vol. 68, p. 64440, in "Pottawatomie Correspondence Collected by Franz Koennecke" (ICC Exhibit 15, p. 3); Upper Canada, "Estimate of Goods Required by the Indian Department as Presents to the Indians in the Annexed Numerical Statement for the Year 1839," November 10, 1837, NA, RG 10, C-11023, vol. 67, pp. 64097, 64101, 64103, and 64107 (ICC Exhibit 15, p. 3).

[182] John Leslie, "The Bagot Commission: Developing a Corporate Memory for the Indian Department," unpublished paper for Canadian Historical Association annual meeting, June 1982, Summary Chart, p. 3.

[183] T.G. Anderson, Indian Superintendent, Manitowaning, "Chippewas of Lakes Huron & Simcoe residing at Beausoliel [sic] Island in Lake Huron, and including a Small Band of Potawatamies living near to it," 1845, NA, RG 10, vol. 268, pp. 163871 (ICC Documents, pp. 31-33).

On June 14, 1844, the two Indian agents on the St Clair River, J.W. Keating and William Jones, were asked to explain to the new Chief Superintendent of Indian Affairs why so many Pottawatomi had been allowed to relocate to Canada. In their joint reply, they stated that the Pottawatomi had come "on the basis of [the] earlier solemn pledges made to them for their services to the King in a time of trial." Moreover, the Indians had come in response to the agents' invitation because the latter had been specifically instructed in 1841 to induce as many as possible to emigrate. Those who entered via Sarnia could not reach Manitoulin Island by water because they travelled by horse rather than by canoe. At Sarnia they had "only hospitality," but at Walpole Island they had refuge owing to land provided by Colonel Alexander McKee in "some complicated land transactions" in 1790.[186]

There were other reasons why they came. Some, not agreeing with their leadership in the United States and wanting to stay in the Great Lakes region, moved to Canada to escape forced assimilation, perhaps expecting that the British would be different from the Americans in that respect.[187] Devoted to their own traditional way of life and religious practices, they were exceptionally resistant to the teachings of missionaries. Most of the Pottawatomi immigrants did not convert to Christianity or take up agriculture en masse. Indeed, in 1854, there were complaints that they were subverting the work of missionaries.[188]

In 1858, at about the time the Beausoleil Band surrendered Beausoleil Island to move to Christian Island, the Indian Commissioner reported that there were about 49 Pottawatomi and 45 Ottawa ("in all 94") already living on Christian Island:

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[184] Superintendent Keating described recently arrived Pottawatomi refugees as "wild, dishonest, turbulent, ragged and filthy": John Leslie, "The Bagot Commission: Developing a Corporate Memory for the Indian Department," unpublished paper for Canadian Historical Association annual meeting, June 1982, Summary Chart, p. 3. See also Clifton, *A Place of Refuge* (ICC Exhibit 13, p. 92). Clifton cites "[NA,] RG 10, vol. 2789."

[185] Clifton, *A Place of Refuge* (ICC Exhibit 13, p. 92). Clifton cites "Report on the Affairs of the Indians in Canada," Province of Canada, Legislative Assembly, Journals, 1844-45.

[186] Clifton, *A Place of Refuge* (ICC Exhibit 13, pp. 58-59, 73-74). Clifton cites William Jones and J.W. Keating, Indian Agents, to J.M. Higginson, Chief Superintendent, June 15, 1844, NA, RG 10, vol. 2789.

[187] Franz M. Koennecke, "The Anishinabek of Moose Deer Point Reserve No. 79: A Historical View," June 30, 1983 (ICC Exhibit 9, p. 18).

[188] Clifton, *A Place of Refuge* (ICC Exhibit 13, p. 92). Clifton cites "Clark to Clench, March 16, [1854, NA], RG 10, vol. 438."

> The former [Pottawatomi] . . . remain heathen though every effort has been made to Christianize them. They have no money payments but the Beausoliel [sic] Indians have offered to receive them into their Band and share the annuity with them, if they will abandon their heathenish customs and embrace christianity.[189]

The Indian Commissioner did not make direct contact in 1858, however:

> The Pottawatomies and Ottawas living on Christian Island did not come to me at Penetanguishene, and I had no means of going to them to take the census, therefore I can only give the numbers as stated in last year's return, viz, - Pottawatamies: 14 men, 17 women, 18 children, making 49; Ottawas: 9 men, 10 women, 26 children, making 45. The former emigrated from Lake Michigan many years ago, and have ever since been considered as belonging to this country. The latter emigrated from the United States, I think in 1854.[190]

In 1877, some of the Pottawatomi who had lived on Christian Island for at least 20 years moved to Parry Island because of the cultural differences between them and the Beausoleil Chippewa (Ojibwa) who had moved in and wanted the Pottawatomi to become Christian. This exodus did not end the Pottawatomi presence on Christian Island, however. Other Pottawatomi moved there later but, as Clifton notes, "[w]here they came from is not clear."[191]

Moose Deer Point Settlement

The ambiguous status of the Pottawatomi in Canada is one of the reasons why they settled on islands, points, and peninsulas along the shore of Lake Huron which were beyond the immediate interest of Canadian developers.[192] Moose Deer Point is a prime example: it was one of the more isolated locations and happened to be abundantly endowed with the requisite resources for a traditional economy.

"Evidence concerning the date of settlement [at Moose Deer Point] varies."[193] The First Nation's position is that "[m]any at Moose Deer Point are descended from Ogemawahj (Ogemahwahjwon, Ogeemawatch, Ogimawadj), who fought in the War of 1812." The statement that "Ogemawahj himself migrated in 1835"[194] is based on the 1912 applications for membership in the Beausoleil/Christian Island Band submitted 77 years after Ogemawahj's ostensible arrival.[195] A mainly Pottawatomi settlement may have existed at Moose Deer Point before present-giving to "visiting Indians" finally ended in 1843. If not, it is certainly likely that it was there before presents to resident Indians ended in 1858 and before Manitoulin Island was opened to general settlement in 1862.

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[189] Extracts from *Report of the Indian Commissioners, 1858*, Appendix 21, vol. 16, No. 6, Province of Canada, Sessional Papers, 1858, in a Memorandum by A.G. Chisholm, December 17, 1912, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 194-91).

[190] Extracts from *Report of the Indian Commissioners, 1858*, Appendix 21, vol. 16, No. 6, Province of Canada, Sessional Papers, 1858, in a Memorandum by A.G. Chisholm, December 17, 1912, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 194-95).

[191] Clifton, *A Place of Refuge* (ICC Exhibit 13, p. 97).

[192] Clifton, *A Place of Refuge* (ICC Exhibit 13, p. 96).

[193] Written Submission on Behalf of Moose Deer Point First Nation, August 1, 1997, p. 56.

There does not appear to be any reason to dispute the statement that some Moose Deer Point people lived previously on Christian Island:

> A number of the Pottawatomi who had been living on Christian Island left the island and settled at Moose Deer Point. This may have occurred because of religious differences between the Christian Island Band, and the more traditional Pottawatomi, or because of leadership conflicts following the death of Ogamawahj.[196]

In other materials submitted by the First Nation, John King is identified as the son of Ogemawahj, who was from Wisconsin.[197] King is said to have moved to the Moose Deer Point location along with the Williams, Jones, Keesis, and Tabobondong families.[198]

Although the present inquiry of the Indian Claims Commission has not included a community session, the documentation provided by the First Nation includes some relevant statements by elders regarding the historical residency of the Pottawatomi. Art Sandy asserted that the Moose Deer Point people had been there for over 150 years (since before 1843), and that they constitute a mixture of Wisconsin Pottawatomi and Manitoulin Island Ottawa who intermarried with Ojibwa from Parry Island and other reserves in the vicinity.[199] Norman Williams stated:

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[194] Written Submission on Behalf of Moose Deer Point First Nation, August 1, 1997, p. 48.

[195] 1912 Applications from non-treaty Indians "to share in the annuity of the Indians known as the Beausoliel [sic] Band" (ICC Documents, pp. 144-92).

[196] Written Submission on Behalf of Moose Deer Point First Nation, August 1, 1997, p. 56.

[197] Cynthia C. Wesley-Esquimaux, "Moose Deer Point: Robinson Huron Treaty Adhesion, Historical Background & Recommendations," March 1988 (ICC Exhibit 5, p. 3). See also Joan Holmes & Associates Inc., "Moose Deer Point I.R. No. 79 Report," October 1994 (ICC Exhibit 2, p. 18).

[198] Charles Skene, Visiting Superintendent, Parry Sound, to Indian Affairs, [no date given], NA, RG 10, vol. 2005, file 7752, Cynthia C. Wesley-Esquimaux, "Moose Deer Point: Robinson Huron Treaty Adhesion, Historical Background & Recommendations," March 1988 (ICC Exhibit 5, p. 9).

[199] Art Sandy, Moose Deer Point First Nation, in Cynthia C. Wesley-Esquimaux and Dr I.V.B. Johnson, "United Anishnaabeg Elders: The Treaties Revisited," April 1996, p. 96 (ICC Documents, p. 418).

> We have been here at Moose Deer Point since the 1830s. We were at Christian Island before that. My father's family came from Wisconsin originally but everyone here is related to people from Parry Island or other Reserves through marriage. My father could speak Pottawatomi but mostly he spoke Ojibway. Everyone here did when I was young.[200]

Williams also added that the Parry Island Ojibway First Nation (Wasuaksing) and the Beausoleil First Nation (Christian Island) had permitted his people to take up residence at Moose Deer Point.[201]

A 1917 report from the Indian Affairs' Survey Branch to the Deputy Superintendent of Indian Affairs stated that Chief John King moved to Moose Deer Point (King's Bay) from the United States "about seventy years ago" – that is, around 1847. Of the four brothers who came with him, two went to Parry Island and two went to Christian Island, with the result that the brothers' descendants were admitted into those two bands. This 1917 report, prepared when Indian Affairs was considering how to define the reserve at Moose Deer Point, described John King and his wife as "non-treaty."[202]

Robinson-Huron Treaty, 1850, and Williams Treaty, 1923

Since the effort to centralize Indians on Manitoulin Island had failed, many Indians were still living along the northernmost shores of Lakes Huron and Superior when mining interests acquired licences in the area in the 1840s. The Robinson-Huron and the Robinson-Superior treaties were designed to deal with the Indians' protests and to open the region for mining. In preparation, Superintendent Anderson and Alexander Vidal, a land surveyor from Sarnia, toured the area, located the bands, and confirmed that they were entitled to compensation.

Many bands were absent when Anderson and Vidal travelled along the shores of the two lakes in the fall of 1849. The two met with groups of chiefs at Manitowaning on October 26, 1849, and Penetanguishene on November 3, 1849; however, neither Anderson nor Vidal recorded the names of the bands and Chiefs with whom they met.[203] The next year, in September 1850, William Benjamin Robinson negotiated the Robinson-Huron and Robinson-Superior treaties with the Ojibwa at Sault Ste Marie. By means of the Robinson-Huron Treaty, the Crown initially acquired the entire northern shoreline of Lake Huron from Lake Superior to Matchedash Bay, which lies south of Moose Deer Point and the Severn River near Coldwater.[204]

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[200] Norman Williams, Moose Deer Point First Nation, in Cynthia C. Wesley-Esquimaux and Dr I.V.B. Johnson, "United Anishnaabeg Elders: The Treaties Revisited," April 1996, p. 98 (ICC Documents, p. 420).

[201] Norman Williams, Moose Deer Point First Nation, in Cynthia C. Wesley-Esquimaux and Dr I.V.B. Johnson, "United Anishnaabeg Elders: The Treaties Revisited," April 1996, p. 99 (ICC Documents, p. 421).

[202] W.R. White, Surveyor, Survey Branch, Department of Indian Affairs, to Duncan C. Scott, Superintendent General of Indian Affairs, October 11, 1917, DIAND file 475/30-10-79, vol. 3 (ICC Documents, pp. 296-97).

[203] Robert J. Surtees, *Treaty Research Report: The Robinson Treaties* (Ottawa: DIAND, 1986), 10-12.

The Robinson-Huron Teaty produced some 21 reserves which, for the most part, were selected by individual Chiefs at locations where their bands had either fishing stations or summer encampments.[205] Although Moose Deer Point is within the geographical area covered by the treaty, the people living there were not taken into account and consequently did not come into any reserve lands or annuities as a result of that treaty.[206]

The three Chippewa Chiefs – Yellowhead, Aisance, and Snake – who had been at Coldwater from 1830 to 1836 protested the Robinson-Huron Treaty just days after it was made. Over 70 years later, in 1923, these protests finally culminated in another treaty – the Williams Treaty – that also covered an area including Moose Deer Point. This treaty overlapped the Robinson-Huron Treaty area and covered the shoreline from the French River to Matchedash Bay.[207] Once again, the people living at Moose Deer Point were not involved when the treaty was made, although the Pottawatomi descendants of Ogemawahj who had joined the Christian Island (Beausoleil) Band membership were party to it.[208] However, the Williams Treaty is outside the scope of this inquiry.

Pottawatomi Approach Other Bands, 1877

In 1867, the Dominion of Canada assumed responsibility for "Indians and lands reserved for Indians." The federal government extended the procedures previously devised in Upper Canada/Canada West for managing Indian Affairs until it passed the first consolidated *Indian Act* in 1876. That year, William Plummer became the Visiting Superintendent and Commissioner based in Toronto, and Charles Skene became the Visiting Superintendent based in Parry Sound.

Possibly as early as 1871, Pottawatomi living at Moose Deer Point, Christian Island, and Parry Island began their quest for treaty annuities in Canada.[209] This effort took various forms over the years. Some individuals gained full membership in the bands at the latter two locations through intermarriage or by specific approval from Indian Affairs. Others who did not gain this status simply continued to live at Moose Deer Point or, with the consent of the bands at Christian Island and Parry Island, on the reserves of those bands.[210]

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[204] Robert J. Surtees, *Indian Land Surrenders in Ontario, 1763-1867* (Ottawa: DIAND, 1984), 97.
[205] Robert J. Surtees, *Indian Land Surrenders in Ontario, 1763-1867* (Ottawa: DIAND, 1984), 97.
[206] Written Submission on Behalf of Moose Deer Point First Nation, August 1, 1997, p. 84.
[207] Robert J. Surtees, *Treaty Research Report: The Robinson Treaties* (Ottawa: DIAND, 1986), 28-29.
[208] Written Submission on Behalf of Moose Deer Point First Nation, August 1, 1997, p. 83.
[209] Clifton, *A Place of Refuge* (ICC Exhibit 13, p. 91). Clifton cites "Memorial, 1871, [NA,] RG 10, vol. 443," but there is no other information about this 1871 effort.

In 1877, Pottawatomi at Moose Deer Point applied to join the Parry Island Band. Superintendent Skene brought them to the attention of the Deputy Minister:

> The Indians in question – named King – are non Treaty Indians and for some years have been settled upon Government Land near Moose [Deer] Point – about 45 miles south of Parry Sound – I am informed that originally they came from the United States about 30 years ago [1847] – belong to the Tribe called Potawattamies, and that for some time they lived upon Christian Island. They all belong to one Family – there being 3 Brothers, and the other men are their sons and nephews.[211]

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[210] Submissions on Behalf of the Government of Canada, August 7, 1997, p. 14; Chief and Principal Men, Parry Island, to Charles Skene, Visiting Superintendent of Indians, February 8, 1877, NA, RG 10, vol. 2005, file 7752 (ICC Documents, pp. 38-39); Charles Skene, Visiting Superintendent of Indians, to E.A. Meredith, Deputy Minister, Department of the Interior, February 23, 1877, NA, RG 10, vol. 2005, file 7752 (ICC Documents, pp. 40-42); E.A. Meredith, Deputy Minister, Department of the Interior, to Charles Skene, Visiting Superintendent of Indians, March 7, 1877, NA, RG 10, vol. 2005, file 7752 (ICC Documents, pp. 43-44); Charles Skene, Visiting Superintendent of Indians, to E.A. Meredith, Deputy Minister, Department of the Interior, NA, RG 10, vol. 2005, file 7752 (ICC Documents, pp. 46-47); L. Vankoughnet, Deputy Superintendent General of Indian Affairs, to William Plummer, Indian Superintendent and Commissioner, January 29, 1879, NA, RG 10, vol. 2076, file 11130 (ICC Documents, p. 51); T.S. Walton, Indian Superintendent, to J.A. Macdonald, Superintendent General of Indian Affairs, July 7, 1887, NA, RG 10, vol. 2381, file 78047 (ICC Documents, p. 89); R.V. Sinclair, for Deputy Superintendent General of Indian Affairs, to T.S. Walton, Indian Superintendent, July 15, 1887, NA, RG 10, vol. 2381, file 78047 (ICC Documents, p. 90); T.S. Walton, Indian Superintendent, to J.A. Macdonald, Superintendent General of Indian Affairs, NA, RG 10, vol. 2381, file 78047 (ICC Documents, p. 99); [L. Vankoughnet, Deputy Superintendent General of Indian Affairs,] to Thomas S. Walton, Indian Superintendent, March 22, 1889, NA, RG 10, vol. 2381, file 78047 (ICC Documents, p. 100); George L. Chitty, Timber Inspector, Department of Indian Affairs, to J.D. McLean, Secretary, Department of Indian Affairs, November 29, 1889, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 103-03A); Resolutions of Non-Treaty Indians, Parry Island, November 29, 1911, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 117-19); Henry Jackson, Secretary to Non-Treaty Indians, to W.H. Bennett, MP, December 5, 1911, NA, RG 10, vol. 2963, file 206745, (ICC Documents, pp. 124, 124A, 124B, and 125); Declaration of Christina Sunday, January 12, 1912, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 126-29); Declaration of Chief Thomas Peters Kadegwon, January 12, 1912, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 130-32); Declaration of Mrs Lewis King, January 12, 1912, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 133-36); Declaration of John Q. King, January 12, 1912, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 137-40); Henry Jackson, Secretary to Non-Treaty Indians, to Duncan C. Scott, Deputy Superintendent General of Indian Affairs, September 9, 1912, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 141-43); 1912 Applications from non-treaty Indians "to share in the annuity of the Indians known as the Beausoliel [sic] Band" (ICC Documents, pp. 144-92); A.G. Chisholm, Barrister & Solicitor, to Department of Indian Affairs, January 7, 1913, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 211, 211A, and 212); Members of the Christian Island Band to Superintendent General of Indian Affairs, February 3, 1914, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 213-15); Members of the Christian Island Band resident on Parry Island to Superintendent General of Indian Affairs, February 3, 1914, NA, RG 10, vol. 2963, file 206745 (ICC Documents, p. 216).

[211] Charles Skene, Visiting Superintendent of Indians, to E.A. Meredith, Deputy Minister, Department of the Interior, February 23, 1877, NA, RG 10, vol. 2005, file 7752 (ICC Documents, p. 41).

The Parry Island Band was willing to let these Moose Deer Point Pottawatomi live on its reserve only if certain conditions of location, sobriety, and industry were met. Even then, they could not share in the band's moneys.[212]

In this and subsequent unsuccessful bids to gain full admission to the Parry Island and Christian Island Bands, the Kings of Moose Deer Point were described as descendants of Pottawatomi Chief Ogemawahj who had received presents at Penetanguishene, settled at Coldwater, and then moved to Christian Island.[213] How closely related the present Moose Deer Point members are to these families is difficult to determine largely because individuals were seldom named in this old departmental correspondence.

In 1878, Plummer noted the difficulties of settlement experienced by the 24 Pottawatomi families living in the Georgian Bay area:

> Some of them have lived on Christian Island and others at different points on the North Shore. They complain that as soon as they clear land and make any improvements, the Indians on whose Reserve they ventured to stop, or others outside of Indian Reserves have claimed the land and driven them away so that for years they have been buffetted [sic] about and driven from place to place. They are anxious to have a piece of land at some point on the North Shore of Georgian Bay where they will not be molested by whites, nor interfered with by other Indians.[214]

Characterizing them as "Canadian Indians, peaceable and industrious, and entitled to the Care and protection of our Department," Plummer suggested to the Minister of the Interior that some "unoccupied point" on the unsurrendered mainland between Penetanguishene and Moose Deer Point be set apart for their permanent occupation.[215] A year later, in January 1879, the

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[212] Chief and Principal Men, Parry Island, to Charles Skene, Visiting Superintendent of Indians, February 8, 1877, NA, RG 10, vol. 2005, file 7752 (ICC Documents, pp. 38-39); Charles Skene, Visiting Superintendent of Indians, to E.A. Meredith, Deputy Minister, Department of the Interior, February 23, 1877, RG 10, vol. 2005, file 7752 (ICC Documents, pp. 38-42); Franz M. Koennecke, "The Anishinabek of Moose Deer Point Reserve No. 79: A Historical View," June 30, 1983 (ICC Exhibit 9, pp. 33-34).

[213] Henry Jackson, Secretary to Non-Treaty Indians, to W.H. Bennett, MP, December 5, 1911, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 124, 124A, 124B, and 125); Declaration of Christina Sunday, January 12, 1912, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 126-29); Declaration of Chief Thomas Peters Kadegwon, January 12, 1912, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 130-32); Declaration of Mrs Lewis King, January 12, 1912, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 133-36); Declaration of John Q. King, January 12, 1912, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 137-40); Henry Jackson, Secretary to Non-Treaty Indians, to Duncan C. Scott, Deputy Superintendent General of Indian Affairs, September 9, 1912, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 141-43); 1912 Applications from non-treaty Indians "to share in the annuity of the Indians known as the Beausoliel [sic] Band" (ICC Documents, pp. 144-92).

[214] William Plummer, Indian Superintendent and Commissioner, to Minister of the Interior, January 15, 1878, NA, RG 10, vol. 2076, file 11130 (ICC Documents, pp. 48-50).

[215] William Plummer, Indian Superintendent and Commissioner, to Minister of the Interior, January 15, 1878, NA, RG 10, vol. 2076, file 11130 (ICC Documents, pp. 48-50). By 1883, Plummer had moved from the "Outside Service" to the position of first-class clerk at Headquarters, the "Inside Service."

Deputy Superintendent General of Indian Affairs asked Plummer to let him know "what extent of land you would recommend should be set apart" for these Indians.[216] If Plummer provided a response, no record of it has been located.

Plummer revived the issue of those at Moose Deer Point wanting a land base in his 1881 annual report:

> There are . . . about 25 families, numbering about 120 individuals, of the Otahwa [sic] and Pottawatamie tribes who came to this country from the United States many years ago and settled on Christian Island, a few of whom still remain there; but the greater portion, 19 families, have removed to "Moose Deer Point," on the north shore of Lake Huron, where they have built houses and brought some land under cultivation. They do not possess any lands nor participate in any money payments, but being of industrious habits, have managed, thus far, to support themselves pretty well.
>
> They have, at different times, expressed to me a strong desire to have a small tract at "Moose Deer Point," where they have settled, set apart for their exclusive use, as they fear that as the district becomes settled they will otherwise have no place to live.[217]

In his annual report for 1882 – his last year of responsibility for the area – Plummer did not raise the issue again.[218]

Skene continued to be the Indian Superintendent at Parry Sound until 1885. Meanwhile, the Penetanguishene Agency, closer to Moose Deer Point, was reopened in 1883 under H.H. Thompson.[219] Thompson's annual reports for 1883 through 1889 do not mention the people at Moose Deer Point. He noted in 1883 that the Christian Island Indians wanted "the rest of the tribe" to move from Manitoulin and Parry Islands to Christian Island. Later, in 1889, he reported that the Chippewa Indians of Beausoleil, most of whom lived on Christian Island, were "happy and comfortable."[220]

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[216] L. Vankoughnet, Deputy Superintendent General of Indian Affairs, to William Plummer, Indian Superintendent and Commissioner, January 29, 1879, NA, RG 10, vol. 2076, file 11130 (ICC Documents, p. 51).

[217] William Plummer, Indian Superintendent and Commissioner, to Deputy Superintendent General of Indian Affairs, Annual Report, December 14, 1881 (ICC Documents, p. 79).

[218] William Plummer, Indian Superintendent and Commissioner, to Deputy Superintendent General of Indian Affairs, Annual Report, November 23, 1882 (ICC Documents, pp. 80-81); *The Canadian Almanac* (Toronto: Copp Clark, 1895-1926).

[219] Thompson remained the Superintendent at Penetanguishene for about a decade, until 1894: *The Canadian Almanac* (Toronto: Copp Clark, 1895-1926).

[220] H.H. Thompson, Indian Agent, Penetanguishene Agency, to Superintendent General of Indian Affairs, Annual Report, September 26, 1883 (ICC Documents, pp. 82-83); H.H. Thompson, Indian Agent, Penetanguishene Agency, to Superintendent General of Indian Affairs, Annual Report, August 26, 1884 (ICC Documents, pp. 84-85); H.H. Thompson, Indian Agent, Penetanguishene Agency, to Superintendent General of Indian Affairs, Annual Report, September 13, 1886 (ICC Documents, pp. 86-87); H.H. Thompson, Indian Agent,

Thomas Walton, MD, became Indian Superintendent at Parry Sound in 1885.[221] His account of the King family history, together with a petition from the Band, had the effect of having Alice King and some other children of Thomas King temporarily admitted to the Parry Island Band in 1888.[222] The Parry Island Chief and councillors were convinced that John King, through his marriage into the Band and his grandfather's loyalty to the British cause, should not be considered non-treaty.[223] Walton, who regarded King as "an exemplary Indian," focused on the apparent anomaly that King was entitled only to interest money while his wife and perhaps their children were entitled to interest money plus the Robinson Treaty annuity.[224]

The King family history was told to Walton by Chief Megis of Parry Island, Chief James of Shawanaga, and John King. Their account had King's father, who died around 1862, being from Mackinaw at the juncture of Lake Michigan and Lake Huron:

> John King the son of Quasing [Ogemawahj] at Sturgeon Point near Waubaushene on the Georgian Bay about the year 1857 [sic]. Quasing now deceased about 15 years was a Pottawatami and was born and brought up at Macinaw. The British made a treaty with the Indians of Macinaw to which Quasing's father was a party. Prior to 1812 King's ancestors received presents from the British Government. During the Battles fought between the British and American forces at Macinaw the father of Quasing fought on the British side and as a reward for such conduct received a Medal which was shown to me about a year ago but which was unfortunately lost last Fall.
>
> John King never resided in the United States, he and his connections were always British.[225]

The apparently successful acceptance of King's children into treaty led the Parry Island Band and Walton to request permission to place King's name on

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Penetanguishene Agency, to Superintendent General of Indian Affairs, Annual Report, September 24, 1888 (ICC Documents, pp. 93-97); H.H. Thompson, Indian Agent, Penetanguishene Agency, to Superintendent General of Indian Affairs, Annual Report, September 24, 1889 (ICC Documents, p. 101).

[221] *The Canadian Almanac* (Toronto: Copp Clark, 1895-1926).

[222] J.D. McLean, Secretary, Department of Indian Affairs, to L. Vankoughnet, Deputy Superintendent General of Indian Affairs, December 27, 1887, NA, RG 10, vol. 2381, file 78047 (ICC Documents, p. 94); R.V. Sinclair, for Deputy Superintendent General of Indian Affairs, to T.S. Walton, Indian Superintendent, January 15, 1888, NA, RG 10, vol. 2381, file 78047 (ICC Documents, p. 95).

[223] Chief and Councillors, Parry Island Band, to Thomas S. Walton, Indian Superintendent, July 7, 1887, NA, RG 10, vol. 2381, file 78047 (ICC Documents, p. 88).

[224] Thomas S. Walton, Indian Superintendent, to Superintendent General of Indian Affairs, July 7, 1887 (ICC Documents, p. 89).

[225] Thomas S. Walton, Indian Superintendent, to Superintendent General of Indian Affairs, December 19, 1887, RG 10, vol. 2381, file 78047 (ICC Exhibit 19).

the Robinson Treaty paylist of the Parry Island Band.[226] This request was denied on the basis that he was not entitled to Robinson Treaty annuities because "neither he nor his ancestors were interested in the country ceded by that Treaty, their habitat having been in the U.S. and the birth place and place of residence of his father having been at Mackinaw."[227]

Furthermore, the Department's March 1889 reply suggested that the admission of John King's children may have been in error.[228] Departmental correspondence some 10 years later referred back to the spring of 1889 when members of the Christian Island Band were said to have been unhappy about the removal from the treaty paylist of certain individuals whom the Chief had considered as having been admitted to the Band.[229]

How to handle non-treaty Indians, some of whom were considered full members of treaty bands and others who were not, and what to do about Indians scattered along the St Clair River and shores of Georgian Bay with no permanent place of settlement were questions that would not go away. About the time Superintendent Thompson retired from the Penetanguishene Agency in 1894, the Inspector of Indian Agencies and Reserves, I.T. Macrae, recommended that the "claims which otherwise will constantly arise . . . be once and forever disposed of" by promoting the adoption of non-treaty Indians "into bands which have reserves upon such terms as would be fair to all concerned." If that was not feasible, he thought they should be given the opportunity to settle on either Manitoulin Island or Walpole Island. He recognized, however, that no one could be forced to go there: "Those tracts [Manitoulin and Walpole islands] were set apart for just such wanderers as these, but it might be found impossible to lead them to go to them." Macrae also recommended an enumeration of the individuals in question as a preparatory step.[230] However, as was the case when the Bagot Commission recommended that a census be taken almost 50 years earlier, no action was taken on the enumeration. As history shows, promoting settlement of non-treaty Indians with other First Nations was never a perfect solution.

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[226] Chief and Councillors, Parry Island Band, to Thomas S. Walton, Indian Superintendent, December 10, 1888, NA, RG 10, vol. 2381, file 78047 (ICC Documents, p. 98); Thomas S. Walton, Indian Superintendent, to Superintendent General of Indian Affairs, March 18, 1889, NA, RG 10, vol. 2381, file 78047 (ICC Documents, p. 99).

[227] [L. Vankoughnet, Deputy Superintendent General of Indian Affairs] to Thomas S. Walton, March 22, 1889, NA, RG 10, vol. 2381, file 78047 (ICC Documents, p. 100).

[228] [L. Vankoughnet, Deputy Superintendent General of Indian Affairs] to Thomas S. Walton, March 22, 1889, NA, RG 10, vol. 2381, file 78047 (ICC Documents, p. 100).

[229] George Chitty, Timber Inspector, Department of Indian Affairs, to J.D. McLean, Secretary, Department of Indian Affairs, November 29, 1899, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 103-03A).

[230] I.T. Macrae, Inspector of Indian Agencies and Reserves, to Secretary, Department of Indian Affairs, November 13, [1894], NA, RG 10, vol. 1916, file 2752 (ICC Exhibit 16, doc. 7).

Chief Paudash and the Historical Societies, 1904

In 1904, Frederick Myers, the president of the Peterborough Historical Society, contacted Indian Affairs about a group of "Ojibways" at Moose Deer Point:

> We have been informed by [Robert] Paudash, Chief of the local tribe of Ojibways [at Rice Lake], that a small number of "non-treaty" Indians as he calls them at and about Moose [Deer] Point in Georgian Bay have been overlooked by the Brit. & Dom. Govts. in the distribution of their favours & rewards to former allies. These Indians received the war-medal but got neither land nor annuities. Paudash thought this very strange as they had come over as allies in the Rev. War & did not dare to return. Will you be kind enough to inform me if this statement is correct, & if so, could anything be done for them.[231]

Chief Paudash started a chain of events that, in 13 years, eventually produced a land base for the Indians at Moose Deer Point.

The Department's first reaction – knowing nothing of Moose Deer Point or the Indians there[232] – was to forward the inquiry to C.L.D. Sims, the Indian Agent on Manitoulin Island, for information. Sims suggested the information be obtained from the Parry Sound Agency, which was "only a short distance" from Moose Deer Point.[233]

Rather than going to Moose Deer Point to learn about the people there, the Indian Agent at Parry Sound, W.B. Maclean, instead met with the Parry Island Band Chief, Peter Megis.[234] Based on this interview, Maclean advised headquarters that only one family of six Indians resided in the vicinity of Moose Deer Point: John King, his wife, three sons, and one daughter. Maclean further reported that they were non-treaty Indians who had been there about 20 years (since 1884) and were descended from Indians who had come from the United States and who had fought for the British during the "Revolutionary War."[235]

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[231] Frederick Myers, President, Peterborough Historical Society, to Department of Indian Affairs, May 21, 1904, NA, RG 10, vol. 3082, file 272 444 (ICC Documents, pp. 104-05).

[232] J.D. McLean, Secretary, Department of Indian Affairs, to W.B. Maclean, Indian Superintendent, Parry Sound, June 1, 1904, NA, RG 10, vol. 3082, file 272,444 (ICC Documents, p. 109).

[233] J.D. McLean, Secretary, Department of Indian Affairs, to C.L.D. Sims, Indian Agent, Manitowaning, May 26, 1904, NA, RG 10, vol. 3082, file 272444 (ICC Documents, p. 106); C.L.D. Sims, Indian Agent, Manitowaning, to J.D. McLean, Secretary, Department of Indian Affairs, May 28, 1904, NA, RG 10, vol. 3082, file 272444 (ICC Documents, p. 108).

[234] Superintendent Walton had approached "Chief Megis of Parry Island" in 1887 for information about the King family, but, from the information available, it is not known if this was the same individual consulted by Maclean 17 years later.

[235] W.B. Maclean, Indian Agent, Parry Sound, to J.D. McLean, Secretary, Department of Indian Affairs, June 9, 1904, NA, RG 10, vol. 3082, file 272444 (ICC Documents, pp. 114-15.).

Before Indian Affairs received this information from Maclean, a statement by Chief Paudash was read to the Ontario Historical Society on June 2, 1904. In it, Chief Paudash alluded to the Indians at Moose Deer Point as "descendants of those who came [circa 1812-13] with Tecumseh," and concluded: "I am sure that if their case was presented to the government they would get either land or annuity like ourselves."[236]

Headquarters relayed Maclean's information to the Peterborough Historical Society, adding: "A brother of John King (David L. King), also a non-Treaty Indian, resides on the Parry Island Reserve." The explanation for why the Moose Deer Point Indians lacked a reserve was the following:

> Provision was made by the Government for all the Indians who were allies of the British, including those who came over to this country from the United States, but a number of them did not settle on the reserve set apart for them, many of them being adopted into various bands with the consent of the Superintendent General, while others preferred to earn their living apart from any reserve.
>
> The annuities and interest moneys received by the Indians are payable to them on account of surrenders made by them to the Crown of lands, timber, etc.; and, as John King and family were not parties to any such surrender, they are not entitled to receive these payments.
>
> As King has not made application to the Department for any assistance, it is pretty evident that he has not required any or does not think he is entitled to any.[237]

Because this response is not specific, one is left to infer that "the reserve set apart for them" was probably Manitoulin Island.

Campaign for Inclusion in Christian Island Band, 1911-16

In November 1911, David L. King became involved with other non-treaty Indians of Parry Island in enlisting the assistance of Henry Jackson of Christian Island to act as their authorized "Secretary" in connection with their bid to be put on treaty paylists.[238] Non-treaty Indians at Christian Island and Moose Deer Point cooperated in this effort to deliver their claims to Indian Affairs through the Member of Parliament for Midland, Ontario, W.H. Bennett.[239]

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[236] J. Hampden Burnham, "The Coming of the Mississaugas" (1905) 6 Ontario Historical Society, *Papers and Records* (ICC Documents, pp. 110-12).

[237] J.D. McLean, Secretary, Department of Indian Affairs, to Frederick Myers, President, Peterborough Historical Society, June 14, 1904, NA, RG 10, vol. 3082, file 272444 (ICC Documents, p. 116).

[238] Resolution of Non-Treaty Indians, Parry Island, November 29, 1911, NA, RG 10, vol. 2963, file 206745 (ICC Documents, p. 117).

[239] Resolution of Non-Treaty Indians, Parry Island, November 29, 1911, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 118-19); Resolution of Non-Treaty Indians, Christian Island, December 4, 1911, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 120-23).

Having obtained the history of the King (Ogemawahj) family from Chief Ogemawahj's grandson, Thomas King, Henry Jackson wrote to Bennett in December 1911.[240] Jackson's letter outlined the history of the King family, Ogemawahj's participation in the War of 1812, and the British promises to Ogemawahj:

> Both before and after the war of 1812 our forefathers lived [west of Lake Michigan] where the State of Wisconsin is now situated, and enjoyed the benefit of the British Government; and, when that war took place, our forefathers were asked to take part in it, and to help the Government to retain the country which they enjoyed.
>
> Chief Misquahzewan (father of Okemahwahjwon) being too old to command, after his people decided to fight for the British, gave the honour to his only son – Okemahwahjwon.
>
> Okemahwahjwon therefore commanded the Indian warriors, a thousand in number, and fought and won the Battle of Mackina Island [on July 17, 1812], in which the general and many officers of the United States Army were killed, and the army driven back to its vessels and so defeated.
>
> By reason of this our forefathers were promised and guaranteed by the British Government that from generation to generation they and their children's children should enjoy the protection of the Government.
>
> After the war was over various treaties were made between the United States and Great Britain, and a Boundary line was set; and Chief Okemahwahjwon then found himself and his people on the United States' side of that line. The British Government made the last distribution of annuity [presents] at Mackina Island, where the Commissioner announced and explained the Treaty to Chief Okemahwahjwon, and all his people, and made them to understand that they must [come or move] across the Boundary line inside of Six Years; and he guaranteed and promised that they should receive the full benefit from the Government, just as the other Indians did who already lived on the Canadian side of the line. Chief Okemahwahjwon and his people came across the border inside the limited time set by the British government, and were directed to come to Penetanguishene where the British military post used to be. There Chief Okemahwahjwon and his people received their first annuity [presents] on Canadian soil, and enjoyed the benefits guaranteed as before stated by the British Government, and settled at Coldwater where Chief Assance lived who later on admitted Chief Okemahwahjwon and his people to his band. . . .[241]

In connection with this initiative by David L. King and Henry Jackson, about 20 applications for inclusion on the treaty paylists, and thus for full membership in the Christian Island (formerly Beausoleil Island) Band, were sent to Indian Affairs in 1912. These applicants, of mostly mixed Pottawatomi, Ottawa, and Chippewa backgrounds,[242] were convinced they had such rights because their ancestors not only had been loyal to Britain in a "time of peril," but also had given up "their ancestral homes to cross the boarder [sic] on the invitation of the Canadian government and to live under the same flag for which they had shed their blood."[243]

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[240] Henry Jackson, Secretary to Non-Treaty Indians, to W.H. Bennett, MP, December 5, 1911, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 124, 124A, 124B, 125).

[241] Henry Jackson, Secretary to Non-Treaty Indians, to W.H. Bennett, MP, December 5, 1911, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 124, 124A, 124B, 125).

In December 1912, A.G. Chisholm, a lawyer based in London, Ontario, prepared a lengthy memorandum on behalf of these applicants for Charles McGibbon, the Inspector of Indian Agencies. Chisholm supplied information such as the relative numbers of Pottawatomi (51) and Ottawa (22), the names of family heads, and lines of descendancy. He retraced the history of the Beausoleil Band, including its membership and its moves from Coldwater to Beausoleil Island and later to Christian Island.[244]

In specific reference to the Pottawatomi, Chisholm described Chief Ogemawahj as the "head of the family of Pottawatamies who settled with the Beausoliel [sic] Band when they lived on Lake Simcoe." While at Coldwater,[245] Ogemawahj "was placed on the list of annuitants at the instigation of old Chief John Assance, the head of the people or tribe, who afterwards became known as the Beausoliel [sic] Band." Chisholm noted that Ogemawahj and his people had later been struck off the Beausoleil list because they were "pagans" but, with the consent of the government, had been allotted land when they relocated with the Beausoleil Band to Christian Island. Ten families, all headed by men with the surname King, were listed by Chisholm as descendants of Ogemawahj, as well as a Mrs Joseph Laperinier and family.[246]

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[242] Declaration of Christian Sunday, January 12, 1912, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 126-29); Declaration of Chief Thomas Peters Kadegwon, January 12, 1912, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 130-32); Declaration of Mrs Lewis King, January 12, 1912, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 133-36); Declaration of John Q. King, January 12, 1912, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 137-40); Henry Jackson, Secretary to Non-Treaty Indians, to Duncan C. Scott, Deputy Superintendent General of Indian Affairs, September 9, 1912, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 141-43); 1912 Applications from non-treaty Indians "to share in the annuity of the Indians known as the Beausoliel [sic] Band" (ICC Documents, pp. 144-92).

[243] Henry Jackson, Secretary to Non-Treaty Indians, to Superintendent General of Indian Affairs, October 30, 1912, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 182, 183, 183A).

[244] Memorandum by A.G. Chisholm, December 17, 1912, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 193, 193A, 194, 195).

[245] Memorandum by A.G. Chisholm, December 17, 1912, NA, RG 10, vol. 2963, file 206745 (ICC Documents, p. 207).

[246] Memorandum by A.G. Chisholm, December 17, 1912, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 200-01). The heads of households that Chisholm listed in 1912 as descendants of Ogemawahj were Edmerick King, James L. King, David Q. King, John Q. Kengis King, Mrs Joseph Laperinier, Thomas W. King, Albert A. King, David L. King, Adam D. King, Esau King, and James George King.

In Chisholm's view, the only reason that the applicants of Ottawa and Pottawatomi descent were not already on the lists was the "careless methods pursued in years past, when apparently from what we read, the Indian Department had nothing to do with the preparation of the lists of those entitled to share in the annuity."[247] No response from Indian Affairs to this memorandum has been found.

Petitions in 1914 from some of the members of the Christian Island Band[248] moved the Department to organize a vote on September 10, 1914, regarding the admission of non-treaty Indians to full membership in the Christian Island Band. The Chief and Council did not want any vote at all,[249] but the Department took the position that the admittance of non-treaty Indians – regardless of whether they were resident on Christian Island or elsewhere – "to full membership of the Christian Island Band [was] a matter solely for the Band to decide."[250]

For a long time, the Christian Island Band was painfully split over the issue of the status of the Pottawatomi. Those who opposed a vote worried about the Band sharing limited funds with increased numbers when "our capital and interest moneys are so small." They were upset by the "disturbance" caused by the issue and sought an end to it.[251] The numbers of potential members scared them. The Chief wrote:

> [W]e therefore refuse to admit non-treaty Indians by election, also because many of them who are not at all entitled to become members of the Band would fall in with the others, such as illegitimates and such like, also residents of other reserves are shown in the list made by Henry Jackson, and we therefore cannot and will not vote on the matter in question.[252]

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[247] Memorandum by A.G. Chisholm, December 17, 1912, NA, RG 10, vol. 2963, file 206745 (ICC Documents, p. 204).

[248] Members of the Christian Island Band to Superintendent General of Indian Affairs, February 3, 1914, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 213-15); Members of the Christian Island Band resident on Parry Island to Superintendent General of Indian Affairs, February 3, 1914, NA, RG 10, vol. 2963, file 206745 (ICC Documents, p. 216).

[249] J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to Chief Josiah G. Monague, Christian Island, September 9, 1914, NA, RG 10, vol. 2963, file 206745 (ICC Documents, p. 233); Resolution of Christian Island Band Council, September 9, 1914, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 234-36).

[250] J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to Charles McGibbon, Inspector of Indian Agencies, August 6, 1914, NA, RG 10, vol. 2963, file 206745 (ICC Documents, p. 230).

[251] Chief Josiah G. Monague and Councillors, Christian Island Band, to J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, August 31, 1914, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 231-32); Resolution of Christian Island Band Council, September 9, 1914, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 234-36).

[252] Chief Josiah G. Monague and Councillors, Christian Island Band, to J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, August 31, 1914, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 231-32).

In spite of this opposition, a vote was held.

McGibbon reported that he had taken a vote on September 10, 1914, over the vigorous objections of the Chief and council, who refused to participate.[253] There was no clear majority in favour of admitting non-treaty Indians, however. Headquarters instructed the Agent at Penetanguishene, C.J. Picotte, to tell the "non-treaty members" of the Christian Island Band to cease their agitation for admission to membership.[254]

Inspector McGibbon's insistence on the vote seems to have been motivated by a desire for consistent departmental control. He favoured the inclusion of resident non-treaty Indians in the Band because he was uncomfortable with non-treaty Indians being born and living on the Christian Island Reserve when they lacked official recognition of their residency. Since they had "no other home," he thought "they should be subject to the same supervision as the Indians who are full members."[255]

The position of the Christian Island Chief and council in 1914 on the Pottawatomi question was clear: there should be a separate reserve for the Pottawatomi. In a petition to the Superintendent General, they contended that the 55 non-treaty Pottawatomi on their reserve "who came from the United States . . . about A.D. 1830 . . . have no rights whatever on our Reserve or to our funds and are complete strangers to us in that regard." They feared that Pottawatomi gaining full admission to the Band would take control and "drive your Petitioners out with nothing." A petition purporting to be on behalf of 94 members of the 134-member Band asked the Minister to give the Pottawatomi "a Reserve to themselves, or in the alternative to have them buy us out and give us another Reserve where we can start life over again."[256]

Discussion of this ongoing question and what should be done about it dragged on for several more years. A.G. Chisholm, the London lawyer, called for another vote in 1914, but the Department ignored him.[257] Then, in April

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[253] Charles McGibbon, Inspector of Indian Agencies, to Duncan C. Scott, Deputy Superintendent General of Indian Affairs, September 14, 1914, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 240-43). Only 34 of 74 eligible voters actually voted and, although all 34 voted in favour of admitting the non-treaty Indians, McGibbon considered that the motion could only be carried with 38 votes in favour.

[254] J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to C.J. Picotte, Indian Agent, Penetanguishene, September 15, 1914, NA, RG 10, vol. 2963, file 206745 (ICC Documents, p. 247).

[255] Charles McGibbon, Inspector of Indian Agencies, to Duncan C. Scott, Deputy Superintendent General of Indian Affairs, September 14, 1914, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 240-43).

[256] Petition, September 14, 1914, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 244-46).

[257] A.G. Chisholm, Barrister & Solicitor, to Duncan C. Scott, Deputy Superintendent General of Indian Affairs, September 22, 1914, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 248-49); J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to A.G. Chisholm, Barrister & Solicitor, September 28, 1914, NA, RG 10, vol. 2963, file 206745 (ICC Documents, p. 259); A.G. Chisholm, Barrister & Solicitor, to J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, October 1, 1914, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 260-61).

1915, the Band moved to admit just two individuals, John Sunday and Elijah King, whom the Agent described as being of good character.[258]

This 1915 vote was challenged by the non-treaty group on the grounds of insufficient notice.[259] The Agent for Christian Island could "not understand why they don't want John Sunday and Elijah King admitted into the Band after being so anxious to have them all admitted."[260] The Department investigated in 1915,[261] but there seems to have been no further correspondence on the subject until 1916, when Elijah King, John Sunday, and 25 other non-treaty residents were admitted to full membership.[262] The Agent was duly instructed to include them on the next paylist for the distribution of interest money.[263]

Land Base Acquired at Moose Deer Point, 1917

In 1916, about the time some non-treaty Pottawatomi and Ottawa Indians were making official inroads into the Christian Island Band, Indian Affairs received an inquiry that would change the circumstances of the non-treaty Indians "squatting" on Crown land at Moose Deer Point. Wallace Nesbitt, a former Supreme Court judge practising law in Toronto, contacted Deputy Superintendent General Duncan C. Scott in May 1916 on behalf of "Indians or Half-Breeds resident near the Adanac [sic] Club" who needed a school. Not only was Nesbitt well connected but he was familiar with the area, having built a cottage there around 1906 after hiring John King to help him investigate an 1879 shipwreck off Moose Deer Point.[264] On receiving Nesbitt's inquiry, Scott wrote for information on these squatters for his reply.[265]

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[258] C.J. Picotte, Indian Agent, Penetanguishene, to J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, May 1, 1915, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 269-70).

[259] Resolution of Christian Island Band, April 14, 1915, NA, RG 10, vol. 2963, file 206745 (ICC Documents, p. 262); Resolutions of Christian Island Band Council, April 14, 1915, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 263-64); A.G. Chisholm, Barrister & Solicitor, to J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, April 17, 1915, NA, RG 10, vol. 2963, file 206745 (ICC Documents, p. 265).

[260] C.J. Picotte, Indian Agent, Penetanguishene, to J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, May 1, 1915, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 269-70).

[261] A.G. Chisholm, Barrister & Solicitor, to J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, April 17, 1915, NA, RG 10, vol. 2963, file 206745 (ICC Documents, p. 265); J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, April 21, 1915, NA, RG 10, vol. 2963, file 206745 (ICC Documents, p. 266); A.G. Chisholm, Barrister & Solicitor, to J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, April 21, 1915, NA, RG 10, vol. 2963, file 206745 (ICC Documents, p. 267); J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to A.G. Chisholm, Barrister & Solicitor, April 22, 1915, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 265-68).

[262] "Members [of Christian Island Band] Voting on admission of Non-Treaty Indians," June 1, 1916, and "List of Names of Non-Treaty Indians admitted to Membership of the Christian Island Band," June 1, 1916, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 272-75).

[263] J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to C.J. Picotte, Indian Agent, Penetanguishene, June 13, 1916, NA, RG 10, vol. 2963, file 206745 (ICC Documents, p. 281).

[264] Franz M. Koennecke, "The Anishinabek of Moose Deer Point Reserve No. 79: A Historical View," June 30, 1983 (ICC Exhibit 9, pp. 42-43).

[265] Duncan C. Scott, Deputy Superintendent General of Indian Affairs, to W.A. Orr, May 3, 1916, DIAND file 475/30-10-79, vol. 3 (ICC Documents, p. 271).

Individuals who had been granted land by the provincial government around Tadenac Bay (a few miles south of Moose Deer Point in Freeman Township) had, by 1890, organized themselves into the Tadenac Club of Toronto. When the Club incorporated in 1895, the lands of the individual members were transferred to the company. Soon the Club controlled about one-third of Freeman Township, and a survey map of 1902 located the "reclusive Pottawatomi community" at Moose Deer Point.[266]

J.D. McLean, Assistant Deputy and Secretary of Indian Affairs, personally visited the Indian village near the Tadenac Club's property in June 1916. On learning of the Indians' desire for land there, McLean anticipated difficulty with this request. His memorandum to the Deputy Superintendent General read:

> Joe Sandy [who was working for Nesbitt] stated that he had asked Hon. Mr. [W.J.]Hanna [the Secretary and Registrar for the Province of Ontario] about two years ago for 1200 acres of land near and including the village and also asked for a school. The land they desire is outside that controlled by the Tadanac [sic] Club and is, I understand, Crown land. The Indian village is located about one mile down from Hon. Mr. Nesbitt's cottage on Pa[r]tridge Bay, about 100 yds. back from the shore, and is on Crown land. If land were obtained in this neighbourhood and a school established, the only access to the site is by boat, and to remove the Indians to a locality more advantageously situated would be a difficult undertaking.[267]

During his visit to the Indian village, McLean found Nesbitt's "intelligent" contact Joe Sandy[268] and prepared a general report on the roughly 50 other men, women, and children of the mostly non-treaty settlement.[269]

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[266] Franz M. Koennecke, "The Anishinabek of Moose Deer Point Reserve No. 79: A Historical View," June 30, 1983 (ICC Exhibit 9, p. 43).

[267] J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to Duncan C. Scott, Deputy Superintendent General of Indian Affairs, June 6, 1916, DIAND file 475/30-10-79, vol. 3 (ICC Documents, p. 280).

[268] J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to Duncan C. Scott, Deputy Superintendent General of Indian Affairs, June 6, 1916, DIAND file 475/30-10-79, vol. 3 (ICC Documents, p. 280); Wallace Nesbitt to Duncan C. Scott, Deputy Superintendent General of Indian Affairs, September 21, 1917, DIAND file 475/30-10-79, vol. 3 (ICC Documents, p. 293).

[269] Joe Sandy's father was a non-treaty Indian of Christian Island. Archie King was born at Moose Deer Point and his wife drew interest money from Christian Island. Frank King was also born at Moose Deer Point and his wife drew interest from Rama. Charlie Isaac, born at Christian Island, was married to a woman who, until her death, drew interest from Christian Island. His house was at Twelve Mile Bay, where he had cleared 15 acres. Mrs Williams was non-treaty and born at Christian Island. She and her children had cleared 25 acres at Twelve Mile Bay. A son, Billy Williams, lived at the village with his wife, who was from Rama. Another son, Dan Williams, married a member of Christian Island and had a clearing of 1 acre in the village. Yet another son, Jack Williams, married a non-treaty Indian of Parry Sound. John King, the Chief, born at Christian Island 60 years earlier and without holdings in the village, lived with his family at Rama, where his wife drew interest. Some men living in the village worked for cottagers or "in the [lumber] shanties." J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to Duncan C. Scott, Deputy Superintendent General of Indian Affairs, June 6, 1916, DIAND file 475/30-10-79, vol. 3 (ICC Documents, pp. 276-80).

Scott believed the request for 1200 acres, extending from Moose Deer Point to Moon River and the borders of the Tadenac Club property, was "too extensive." In a letter to Hanna, he said he expected that the Province of Ontario would not be willing to set apart so much land in that district, adding that in his view "200 or 300 acres of land would be all that would be required."[270]

Almost a year went by before there was any other action on the request. Scott had to follow up with Ontario's Minister of Lands, Mines, and Forests, G. Howard Ferguson, in February and August 1917. By August, the Indians had expressed concern that a lumber firm had bought the timber on the land they wanted for a reserve. Scott wrote to Ferguson: "I hope this rumour is not correct, as if the land is stripped of the timber, it will not be nearly so desirable as a location for the Indians."[271] As things turned out, all the timber in Freeman Township was subject to an old timber licence.[272] By September 1917, Indian Affairs' Timber Inspector, H.J. Bury, had met with Ferguson, who by then was willing to "grant a licence of occupation at a nominal rent."[273] Surveyor W.R. White of Indian Affairs' Survey Branch was dispatched by McLean to survey 500 or 600 acres for the proposed lease.[274] Albert Grigg of the province's Surveys Branch presumed that "two or three of the lots fronting on Moose Bay would be those required."[275]

In September, Nesbitt asked for a halt to the cutting of hardwood. All Scott could reply was: "I hope we will have sufficient influence with the Hon. Mr. Ferguson to have the lands selected for the reserve eliminated from the timber license."[276] Nesbitt, whom the Department hoped would assist the surveyor, recommended that the reserve include portions west and south of Twelve Mile Bay.[277]

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[270] Duncan C. Scott, Deputy Superintendent General of Indian Affairs, to W.J. Hanna, Secretary and Registrar, Province of Ontario, October 13, 1916, DIAND file 475/30-10-79, vol. 3 (ICC Documents, p. 282).

[271] Duncan C. Scott, Deputy Superintendent General of Indian Affairs, to G.H. Ferguson, Minister of Lands, Mines and Forests, Province of Ontario, February 6, 1917, DIAND file 475/30-10-79, vol. 3 (ICC Documents, p. 284); Duncan C. Scott, Deputy Superintendent General of Indian Affairs, to G.H. Ferguson, Minister of Lands, Forests and Mines, Province of Ontario, August 22, 1917, DIAND file 475/30-10-79, vol. 3 (ICC Documents, p. 288).

[272] Albert Grigg, Deputy Minister, Ontario Department of Lands, Forests, and Mines, to Duncan C. Scott, Deputy Superintendent General of Indian Affairs, September 19, 1917 (ICC Documents, p. 292); Wallace Nesbitt to D.C. Scott, Deputy Superintendent General of Indian Affairs, September 21, 1917, DIAND file 475/30-10-79, vol. 3 (ICC Documents, p. 293).

[273] H.J. Bury, Timber Inspector, Department of Indian Affairs, to Duncan C. Scott, Deputy Superintendent General of Indian Affairs, September 14, 1917, DIAND file 475/30-10-79, vol. 3 (ICC Documents, p. 290).

[274] J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to W.R. White, Surveyor, Survey Branch, Department of Indian Affairs, September 18, 1917, DIAND file 475/30-10-79, vol. 3 (ICC Documents, p. 291).

[275] Albert Grigg, Deputy Minister, Ontario Department of Lands, Forests, and Mines, to Duncan C. Scott, Deputy Superintendent General of Indian Affairs, September 19, 1917 (ICC Documents, p. 292).

[276] Duncan C. Scott, Deputy Superintendent General of Indian Affairs, to Wallace Nesbitt, September 24, 1917, DIAND file 475/30-10-79, vol. 3 (ICC Documents, p. 295).

In October 1917, White reported 53 individuals in 12 families at Moose Deer Point, King's Bay. They seemed to be more or less the same families noted by Secretary McLean in 1916, with the addition of Wilson Isaac, John Isaac, and Sam Isaac as heads of households. Whereas McLean had described John King as having been born at Christian Island *circa* 1856, living mostly at Rama, and having no holdings in the village,[278] White wrote that John King and wife had "moved to this location 70 yrs. ago [circa 1837] from U.S. both non-treaty." The other 11 heads of households he described as "descendants of John King" and "born here."[279] As already mentioned, White also noted, but did not name, the four brothers of John King who came with him, "two going to Parry Island and two to Christian Island," with their descendants being admitted to memberships of the two bands at those locations.[280]

Referring to a "Plan No. 1706" which he had prepared, White described the Indians' improvements and clearings, and the agricultural efforts associated with each.[281] Joe Sandy's house was being used as the school, but White surveyed a portion of the same lot for a school.[282] White observed that the men of Moose Deer Point were "all lumbermen, working in the lumber camps in the winter time and guiding for tourists in the summer."[283] Lands in the locality, including those occupied by the Indians, were under timber licence to the Conger Lumber Company and the Muskoka Lumber Company.[284] In view of the rumour that wood on these lands was soon to be cut,

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[277] Wallace Nesbitt to Duncan C. Scott, Deputy Superintendent General of Indian Affairs, September 24, 1917, DIAND file 475/30-10-79, vol. 3 (ICC Documents, p. 293).

[278] J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to Duncan C. Scott, Deputy Superintendent General of Indian Affairs, June 6, 1916, DIAND file 475/30-10-79, vol. 3 (ICC Documents, pp. 276-80).

[279] The heads of households listed in 1917 were Joe Sandy, Archie King, Frank King, J. Williams, W. Williams, Dan Williams, Charles Isaac, Wilson Isaac, Mrs J. Williams, John King (Chief), John Isaac, and Sam Isaac. W.R. White, Surveyor, Survey Branch, Department of Indian Affairs, to Duncan C. Scott, Superintendent General of Indian Affairs, October 11, 1917, DIAND file 475/30-10-79, vol. 3 (ICC Documents, pp. 296-99).

[280] W.R. White, Surveyor, Survey Branch, Department of Indian Affairs, to Duncan C. Scott, Superintendent General of Indian Affairs, October 11, 1917, DIAND file 475/30-10-79, vol. 3 (ICC Documents, pp. 296-99).

[281] W.R. White, Surveyor, Survey Branch, Department of Indian Affairs, to Duncan C. Scott, Superintendent General of Indian Affairs, October 11, 1917, DIAND file 475/30-10-79, vol. 3 (ICC Documents, pp. 296-99).

[282] W.R. White, Surveyor, Survey Branch, Department of Indian Affairs, to Duncan C. Scott, Superintendent General of Indian Affairs, October 11, 1917, DIAND file 475/30-10-79, vol. 3 (ICC Documents, p. 298).

[283] W.R. White, Surveyor, Survey Branch, Department of Indian Affairs, to Duncan C. Scott, Superintendent General of Indian Affairs, October 11, 1917, DIAND file 475/30-10-79, vol. 3 (ICC Documents, p. 29).

[284] The lots acquired for the Indians were under licence to the Conger Lumber Company (Lots 54, 44, 56) and the Freeman Lumber Company (all other lots): Albert Grigg, Deputy Minister, Ontario Department of Lands, Forests, and Mines, to J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, December 18, 1917, DIAND file 475/30-10-79, vol. 3 (ICC Documents, p. 317).

White suggested early acquisition of the lands to preserve the wood for the Indians.[285]

On receiving White's report and survey plan, Scott advised Ferguson on October 12, 1917, that, at "King or Alexander Bay, Moose [Deer] Point, off Georgian Bay," the Indian improvements – fences, clearings, houses, orchards, and gardens –"must be considered as being fairly extensive in view of the nature of the country as they are only able to cultivate the valleys which have enough soil between the ridges of rock." The descendants of John King were considered to be "very industrious people" who worked in lumber camps and as guides. Scott added:

> [T]hey cannot be considered as hunters or fishermen as the only hunting or fishing done by them is a little for their own use. In the scale of living they appear to be quite superior to the ordinary northern Ontario Indian.[286]

Somehow, the character of the Indians at Moose Deer Point seemed to be a factor in the decision to create a reserve.[287]

Scott was well aware that the province was not very receptive to the idea of setting aside lands for Indians at Moose Deer Point. In Toronto, it had been suggested to White that the east half of lot 54 in concession 7 be withheld "as it would be valuable as a summer resort site," but Scott disagreed. He did not consider the site suited to summer resort purposes, but rather viewed it as "of vital importance to the Indians as the eastern part contains a considerable portion of land suitable for cultivation."[288]

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[285] W.R. White, Surveyor, Survey Branch, Department of Indian Affairs, to Duncan C. Scott, Superintendent General of Indian Affairs, October 11, 1917, DIAND file 475/30-10-79, vol. 3 (ICC Documents, p. 299).

[286] Duncan C. Scott, Deputy Superintendent General of Indian Affairs, to G.H. Ferguson, Minister of Lands, Forests, and Mines, Province of Ontario, October 12, 1917, DIAND file 475/30-10-79, vol. 3 (ICC Documents, pp. 300-03).

[287] In writing to Ontario's Director of Surveys and Secretary to the Minister of Lands, Forests, and Mines, White extolled the virtues of the people at Moose Deer Point:

> I . . . found the Indians much farther advanced than I had expected, quite unlike the ordinary Indians. They are lumbermen, not poachers and fishermen as might have been supposed, and are especially useful in that locality. They are industrious and anxious to improve.

W.R. White, Surveyor, Survey Branch, Department of Indian Affairs, to L.V. Rorke, Director of Surveys, and Mr Hels, Secretary to Minister, Ontario Department of Lands, Forests, and Mines, October 20, 1917, DIAND file 475/30-10-79, vol. 3 (ICC Documents, pp. 305-06). When White was advised that the province would be granting the land, the Deputy Minister of Lands and Forests wrote: "[I]t is hoped that the Indians will prove themselves good citizens and appreciate the action taken on their behalf": Albert Grigg, Deputy Minister, Ontario Department of Lands, Forests, and Mines, to W.R. White, Surveyor, Survey Branch, Department of Indian Affairs, October 20, 1917, DIAND file 475/30-10-79, vol. 3 (ICC Documents, p. 307).

[288] Duncan C. Scott, Deputy Superintendent General of Indian Affairs, to G.H. Ferguson, Minister of Lands, Forests, and Mines, Province of Ontario, October 12, 1917, DIAND file 475/30-10-79, vol. 3 (ICC Documents, p. 302).

Scott's argument to the province was that, "[o]wing to the superior state of this band, and their extensive improvements," they "should be encouraged in every possible way." He therefore proposed "a grant of the lots on which the Indian improvements are situated, instead of a lease of occupation."[289] This amounted to only three fairly small and unconnected areas initially estimated to total 639 acres in the Township of Freeman, District of Muskoka.[290] The area exceeded the 200 or 300 acres first requested by Scott because, as the province acknowledged,"this Band of Indians is scattered and occupy portions of the different lots indicated on [White's plan]."[291] The province proposed 50 cents per acre as the price Indian Affairs should pay for the lands, and Canada agreed to this amount. Finally, at the end of 1917, after delays in completing the formal survey occasioned by inclement weather and the need to make routine adjustments in the way the lines were drawn, Canada paid $309.50 for what ultimately proved to be 619 acres.[292] The price excluded pine timber on the 619 acres which did not pass to the Indians. However, the province agreed to withdraw the lands from other timber licences upon receiving the purchase price from Canada.[293]

Ontario's Order in Council of December 26, 1917, vested the 619 acres in Indian Affairs "for the use of the Indians residing on said lands." The rationale for establishing the reserve was vague: "In support of the application it is stated that the Indian men find employment as guides and caretakers during the summer and go to the lumbering woods in the winter, that it is desired to establish a school and enable them to grow garden stuff and provide fuel for their dwellings." The Order in Council made it clear that the province reserved "all mines, minerals and pine trees" for itself; however, in

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[289] Duncan C. Scott, Deputy Superintendent General of Indian Affairs, to G.H. Ferguson, Minister of Lands, Forests, and Mines, Province of Ontario, October 12, 1917, DIAND file 475/30-10-79, vol. 3 (ICC Documents, p. 302).

[290] Duncan C. Scott, Deputy Superintendent General of Indian Affairs, to G.H. Ferguson, Minister of Lands, Forests, and Mines, Province of Ontario, October 12, 1917, DIAND file 475/30-10-79, vol. 3 (ICC Documents, pp. 302-03); Duncan C. Scott, Deputy Superintendent General of Indian Affairs, to Wallace Nesbitt, October 13, 1917, DIAND file 475/30-10-79, vol. 3 (ICC Documents, p. 304).

[291] [Albert Grigg, Deputy Minister, Ontario Department of Lands, Forests and Mines] to Duncan C. Scott, Deputy Superintendent General of Indian Affairs, October 20, 1917, DIAND file 475/30-10-79, vol. 3 (ICC Documents, p. 308).

[292] J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to Albert Grigg, Deputy Minister, Ontario Department of Lands, Forests, and Mines, November 21, 1917, DIAND file 475/30-10-79, vol. 3 (ICC Documents, pp. 312-13); Albert Grigg, Deputy Minister, Ontario Department of Lands, Forests, and Mines, to J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, December 4, 1917, DIAND file 475/30-10-79, vol. 3 (ICC Documents, p. 315); J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to Albert Grigg, Deputy Minister, Ontario Department of Lands, Forests, and Mines, December 15, 1917, DIAND file 475/30-10-79, vol. 3 (ICC Documents, p. 316A).

[293] Albert Grigg, Deputy Minister, Ontario Department of Lands, Forests, and Mines, to J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, December 18, 1917, DIAND file 475/30-10-79, vol. 3 (ICC Documents, p. 317).

1926, the pine trees were transferred to the federal Crown.[294] The province also reserved the right "to cancel the vesting of these lands should they at any time cease to be occupied or used by the Indians and their descendants now located thereon."[295]

Once Indian Affairs received this provincial Order in Council, it took no further action. There was no counterpart federal Order in Council accepting the transfer of land or formally setting it apart as a reserve.[296] Indeed, in 1921, when Chief Samuel Isaac sought some reassurance that the Moose Deer Point reserve was "safe from invasion,"[297] the Department simply forwarded him the provincial Order in Council.[298]

In 1969, Canada granted portions of the Moose Point Indian Reserve to Freeman Township "for road purposes," reasoning that those portions were "not required for public purposes." What acreage this amounted to is not apparent from the descriptions in the grant.[299]

Request to Adhere to Robinson Treaties, 1932

By the early 1930s, most of Canada was experiencing the economic disaster known as the Great Depression. Although proximity to wealthy neighbours had been of some benefit to the Indians of Moose Deer Point, they asked again in May 1932 to be included in the Robinson-Huron Treaty. Under Chief Isaac, six men named Isaac and five named Williams signed a petition describing the community as the "direct descendants & Remnants of Tribes of Lake Huron Indians, in the County of Muskoka, Township of Freeman." They represented "about 40 individuals who are deprived and are awaiting the Government to negotiate the Treaties." Specifically, they asked "to enter under the Robinson Treaties, 1850, to draw the shares and Treaty monies this fall payment."[300]

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[294] "Crown Sale, Grant to His Majesty the King as represented by the Superintendent General of Indian Affairs [of] Pine Trees on Certain Lots in the Township of Freeman in the District of Muskoka," DIAND Land Registry Item X24538S (ICC Documents, pp. 340-41).

[295] Order in Council, Province of Ontario, December 28, 1917, DIAND Land Registry Item H46215 (ICC Documents, pp. 318-18A).

[296] Albert Grigg, Deputy Minister, Ontario Department of Lands, Forests, and Mines, to J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, January 7, 1918, DIAND file 475/30-10-79, vol. 3 (ICC Documents, p. 319); Written Submission on Behalf of the Government of Canada, August 7, 1997, p. 19.

[297] Wallace Nesbitt to J.G.A. Creighton, Law Clerk, Senate, August 18, 1921, DIAND file 475/30-10-79, vol. 3 (ICC Documents, p. 337); J.G.A. Creighton, Law Clerk, Senate, to Duncan C. Scott, Deputy Superintendent General of Indian Affairs, August 19, 1921, DIAND file 475/30-10-79, vol. 3 (ICC Documents, p. 338).

[298] Acting Assistant Deputy and Secretary, Indian Affairs, to Chief Isaacs [sic], Moon Falls, Ontario, August 22, 1921, DIAND file 475/30-10-79, vol. 3 (ICC Documents, p. 339).

[299] Governor General in Council, Letters Patent, March 11, 1969, DIAND Land Registry Item R8704 (ICC Documents, pp. 356, 356A, 356B, 356C).

[300] Samuel Isaac and others to Superintendent General of Indian Affairs, May 13, 1932, DIAND file 475/30-10-79, vol. 3 (ICC Documents, p. 342).

The Acting Superintendent General of Indian Affairs, A.S. Williams, was aware that these individuals were Pottawatomi.[301] He was advised by the Department's Chief Accountant that the claims of descent would need to be investigated before any action could be taken.[302] Two weeks later, the official response from the Department was negative and intentionally discouraging:

> [W]e have no material on file which would support your application to be entitled to participate in these annuities. In fact any material we have on file is against such an application. While it may be true that some of you may be direct descendants of Indians who were included in the said treaties, that of itself would not give you the right to participate.[303]

The Department did not offer to investigate the genealogy of any individuals, but instead simply relied on information received years earlier:

> Our information is that the majority of your people are descendants of John King who came to that location about 85 years ago from the United States. In view of this situation I regret that we are unable to entertain your claim.[304]

There is no evidence before the Commission to indicate whether the Moose Deer Point First Nation raised any further inquiries with the federal government prior to submitting its specific claim to the Department of Indian Affairs and Northern Development on April 6, 1995. Thus, the First Nation remains to this day a non-treaty band with a very small three-parcel reserve dotting Moose Deer Point.

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[301] A.S. Williams, Acting Deputy Superintendent General of Indian Affairs, to Mr Matheson, circa May 23, 1931, DIAND file 475/30-10-79, vol. 3 (ICC Documents, p. 344A).

[302] F. Paget, Chief Accountant, Department of Indian Affairs, to A.S. Williams, Acting Deputy Superintendent General of Indian Affairs, May 23, 1932, DIAND file 475/30-10-79, vol. 3 (ICC Documents, p. 344).

[303] T.R.L. MacInnes, Acting Secretary, Department of Indian Affairs, to Samuel Isaac and others, May 27, 1932, DIAND file 475/30-10-79, vol. 3 (ICC Documents, p. 345).

[304] T.R.L. MacInnes, Acting Secretary, Department of Indian Affairs, to Samuel Isaac and others, May 27, 1932, DIAND file 475/30-10-79, vol. 3 (ICC Documents, p. 345).

PART III

ISSUES

At the August 30, 1996, planning conference, Canada and the Moose Deer Point First Nation agreed that there are three primary issues in this inquiry:

1 Were promises made by the Crown to its allies, including ancestors of the Moose Deer Point First Nation?

2 If promises were made by the Crown to its allies, including ancestors of the Moose Deer Point First Nation, what were the nature and the scope of the promises?

3 Does the Crown have an outstanding lawful obligation to the Moose Deer Point First Nation?

Part IV of this report sets out our analysis of these three issues. In the first section, we will consider the factual question of whether promises made by the Crown in its addresses to the Indians in 1837 and at other times can be considered to have been made to ancestors of the present-day Moose Deer Point First Nation. The second part of our analysis will deal with the principles of treaty interpretation, the tests for determining the existence of a treaty, and the significance, if any, of concluding that promises made by Canada to a First Nation amount to a treaty, as opposed to a mere agreement. Moreover, we will consider the capacity of the First Nation's ancestors to enter into a treaty or agreement, and the nature and scope of the promises, if any, made by the Crown to those ancestors. In particular, if we conclude that promises *were* made to the First Nation's predecessors, we will also be called upon to examine whether those promises included setting aside lands for the First Nation's use and occupation, protecting the First Nation in its use and occupation of those lands and other lands for traditional purposes, continuing to provide the First Nation with presents, and treating the Pottawatomi equally with other aboriginal peoples resident in Ontario.

Finally, we will address whether the Crown owes an outstanding lawful obligation to the Moose Deer Point First Nation.

PART IV

ANALYSIS

ISSUE 1 PROMISES TO THE INDIANS

Were promises made by the Crown to its allies, including ancestors of the Moose Deer Point First Nation?

The first issue in this inquiry involves questions of fact more than of law – namely, whether statements made by the Crown amounted to promises to its allies, and, if so, whether the allies to whom those promises were directed included ancestors of the Moose Deer Point First Nation. Our task is made easier by the following concession made by the Crown in its written submission:

> The evidence indicates that these Pottawatomi came to Canada after the War of 1812 for several reasons, including: actions taken by the Americans to move the Indians west; because they "did not dare to return" (ICC Doc. 104-105); in the hope of avoiding forcible assimilation into non-native culture (ICC Exhibit 9, at 18); and because of promises by the British that if they came to Upper Canada they would be "treated the same as other Indians." (ICC Doc. 419)
>
> One group eventually settled at Moose Deer Point. (ICC Doc. 38-39)
>
> Page 15 of the historical report prepared by Joan Holmes & Associates, Inc. in 1994 (ICC Exhibit 2) lists various members of the King family who completed applications for band membership, or who were listed in reports of non-treaty Indians residing on reserves. The report compares the names of the applicants, and the names of siblings and parents, with lists of individuals and families residing at Moose Deer Point, and concludes that the group of Indians residing at Moose Deer Point were descended from Chief Ogemahwahjwon, who had fought for the British in the War of 1812, and that they were descendants of the Pottawatomi who migrated to Canada in the 1830's or 1840's.
>
> Despite various inconsistencies and gaps in the historical record, for the purposes of this inquiry Canada accepts this conclusion as accurate.
>
> *Although there is no evidence that ancestors of the Moose Deer Point First Nation were present at the 1837 council at Manitouwaning [sic], there is evidence indicating that similar promises were likely made to the First Nation's*

> *ancestors at another council, probably in 1836, the last year presents were distributed at Macinac [sic] Island.*[305]

After reviewing various accounts of the promises made to Moose Deer Point ancestors in 1836, Canada concludes:

> It is Canada's position that the evidence discloses that promises were likely made by the Crown to the ancestors of the Moose Deer Point First Nation.[306]

Canada still disputes whether the ancestors to whom the promises were made had the capacity to treat with Canada, whether there was sufficient mutuality of promises to give rise to a treaty or even a mere agreement, and whether the parties intended to enter into a treaty in any event. However, from the foregoing statements, it can be seen that Canada has conceded that promises *were* made, and that the intended beneficiaries of those promises included ancestors of present members of the First Nation.

ISSUE 2 NATURE AND SCOPE OF THE CROWN'S PROMISES

If promises were made by the Crown to its allies, including ancestors of the Moose Deer Point First Nation, what were the nature and the scope of the promises?

It having been conceded by Canada that the first issue should be answered in the affirmative, the real point of contention is whether the nature of the promises is such that those promises can reasonably be construed as a treaty, and, if so, the effect of such a finding and the scope of the promises. To resolve these issues, we must first identify the criteria for determining whether the promises constituted a treaty, and in so doing we will review the principles of treaty interpretation to assist us in defining those circumstances in which a treaty can be said to exist. As required, we will also ascertain the consequences of finding that the promises constituted a treaty or an agreement, or both – or neither. Second, we must address certain factual questions: whether the First Nation had the *capacity* to treat or contract, whether there was a *mutuality* of promises flowing both to and from the Indians, and whether the circumstances demonstrate that the parties even *intended* to treat or contract. Third, we must examine the content of the promises.

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[305] Written Submission on Behalf of the Government of Canada, August 7, 1997, p. 31. Emphasis added.
[306] Written Submission on Behalf of the Government of Canada, August 7, 1997, p. 31.

Finally, depending on Canada's subsequent actions in fulfilment of those promises, we can determine whether Canada owes an outstanding lawful obligation to the First Nation.

We turn now to the question of whether Canada's promises amounted to a treaty.

Did the Promises Constitute a Treaty?

As the Commission noted in Part I of this report, the Moose Deer Point First Nation contends that the promises made to its ancestors by representatives of the British Crown in the 1830s amounted to a *treaty*. For its part, although Canada does not deny that promises were made to the ancestors of the First Nation, it puts forward the position in its written submissions that these promises at best amounted to a *contract* rather than a treaty. During oral submissions, however, Canada went further, arguing that the promises constituted *neither* a treaty nor an agreement[307] but rather a mere policy direction or unilateral announcement on the part of the British government.[308] Alternatively, Canada argues that, if the promises constituted an agreement (as opposed to a treaty), they could be terminated on reasonable notice and were, in fact, terminated in 1852 with respect to presents.[309]

The initial question facing the Commission, then, is whether the promises did in fact constitute a treaty. To answer this question properly, it is necessary to consider the constituent elements of a treaty at law.

Principles of Treaty Interpretation

The courts have been asked on a number of occasions to consider whether particular dealings between Canada and its aboriginal people have given rise to treaties, with the result that a number of principles have emerged which are instructive in the present inquiry. Counsel for the parties to this inquiry appear to concur that the leading cases in this area are the decisions of the Supreme Court of Canada in *Simon v. The Queen*[310] and *R. v. Sioui*.[311]

In *Simon*, the appellant, a registered Micmac Indian, was convicted under subsection 150(1) of Nova Scotia's *Lands and Forests Act* for illegal possession of a rifle and shotgun cartridges. Although the appellant admitted all the essential elements of the charges, he argued that the right to hunt set out in the Treaty of 1752, in conjunction with section 88 of the *Indian Act*, provided him with immunity from prosecution under the provincial statute. Article 4 of the treaty stated that the Micmacs have "free liberty of Hunting & Fishing as usual," and section 88 of the *Indian Act* provided that provincial laws of general application applied to Indians, ***subject to the terms of any treaty***.

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[307] ICC Transcript, April 8, 1998, p. 120 (Perry Robinson).
[308] ICC Transcript, April 8, 1998, p. 122 (Perry Robinson).
[309] ICC Transcript, April 8, 1998, p. 120 (Perry Robinson).
[310] *Simon v. The Queen*, [1985] 2 SCR 387.
[311] Sioui, [1990] 1 SCR 1025, Lamer J.

One issue before the Supreme Court of Canada was whether the Treaty of 1752 was a "treaty" within the meaning of section 88 of the *Indian Act*. Macdonald JA of Nova Scotia's Supreme Court Appellate Division (Hart JA concurring) had expressed doubt that the Treaty of 1752 could be considered a "treaty" because it was merely a general confirmation of aboriginal rights and did not grant or confer "new permanent rights." He added that the treaty failed under section 88 because it was made by only a small portion of the Micmac Nation and did not define any land or area where the rights were to be exercised.

Before the Supreme Court of Canada, counsel for Canada argued that the Treaty of 1752 did not amount to a "treaty" under section 88 or the extended definition of "treaty" in *R. v. White and Bob*[312] because the treaty did not deal with the ceding of land or the delineation of boundaries. On behalf of the Court, Dickson CJ held:

> To begin, the fact that the Treaty did not create new hunting or fishing rights but merely recognized pre-existing rights does not render s. 88 inapplicable. On this point, Davey J.A. stated in *R. v. White and Bob*, *supra*, at p. 616:
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> > The force of the first argument seems to depend upon the assumption that s. 87 [now s. 88] should be read as if it were subject only to rights created by the Treaty; that would remove from the saving clause rights already in being and excepted from or confirmed by a Treaty. That argument fails to accord full meaning to the words, "subject to the *terms* of any treaty . . ." In my opinion an exception, reservation, or confirmation is as much a term of a Treaty as a grant, (I observe parenthetically that a reservation may be a grant), and the operative words of the section will not extend general laws in force in any Province to Indians in derogation of rights so excepted, reserved or confirmed.
>
> . . .
>
> With respect to the respondent's submission that some form of land cession is necessary before an agreement can be described as a treaty under s. 88, I can see no principled basis for interpreting s. 88 in this manner. I would adopt the useful comment of Norris J.A. of the British Columbia Court of Appeal in *R. v. White and Bob*,

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[312] *R. v. White and Bob* (1964), 50 DLR (2d) 613 (BCCA), affirmed [1965] SCR vi, 52 DLR (2d) 481.

> *supra*, affirmed on appeal to this Court. In a concurring judgment, he stated at pp. 648-49:
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>> The question is, in my respectful opinion, to be resolved not by the application of rigid rules of construction without regard to the circumstances existing when the document was completed nor by the tests of modern day draftsmanship. In determining what the intention of Parliament was at the time of the enactment of s. 87 [now s. 88] of the *Indian Act*, Parliament is to be taken to have had in mind the common understanding of the parties to the document at the time it was executed. In the section "Treaty" is not a word of art and in my respectful opinion, it embraces all such engagements made by persons in authority as may be brought within the term "the word of the white man" the sanctity of which was, at the time of British exploration and settlement, the most important means of obtaining the goodwill and co-operation of the native tribes and ensuring that the colonists would be protected from death and destruction. On such assurance the Indians relied.
>
> In my view, Parliament intended to include within the operation of s. 88 all agreements concluded by the Crown with the Indians that would otherwise be enforceable treaties, whether land was ceded or not. None of the Maritime treaties of the eighteenth century cedes land. To find that s. 88 applies only to land cession treaties would be to limit severely its scope and run contrary to the principle that Indian treaties and statutes relating to Indians should be liberally construed and uncertainties resolved in favour of the Indians.
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> Finally, it should be noted that several cases have considered the Treaty of 1752 to be a valid "treaty" within the meaning of s. 88 of the *Indian Act*. . . . The Treaty was an exchange [of] solemn promises between the Micmacs and the King's representative entered into to achieve and guarantee peace. It is an enforceable obligation between the Indians and the white man and, as such, falls within the meaning of the word "treaty" in s. 88 of the *Indian Act*.[313]

From these passages it can be seen that land cession is not an essential element of treaty making. Moreover, treaties can merely *recognize* and *confirm* pre-existing rights and need not *create* new ones. Just as significant, however, is Chief Justice Dickson's comment that the word "treaty" is not a term of art. Rather, a treaty is an exchange of solemn promises embracing "all such engagements made by persons in authority as may be brought within the term 'the word of the white man'" and giving rise to enforceable obligations between Indians and the Crown. From this definition we infer that it is not necessary to find that the Crown and the Indians in a given case intended to enter into a *treaty*, but instead that they merely intended to enter solemn engagements creating binding obligations. In other words, the parties were not required to turn their minds to whether the transaction into which they were entering was properly termed a "treaty"; the courts will consider the transaction to be a "treaty" if, in substance, that is what it was.

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[313] *Simon v. The Queen*, [1985] 2 SCR 387 at 409-10, Dickson CJ. Original emphasis.

In our view, this conclusion is confirmed in the reasons of Lamer J (as he then was) on behalf of the Court in *Sioui*. In that case, the respondent Indians had been convicted of cutting down trees, camping, and making fires in undesignated areas of Jacques-Cartier Park contrary to sections 9 and 37 of the *Regulation respecting the Parc de la Jacques-Cartier*, which had been adopted pursuant to Quebec's *Parks Act*. As in *Simon*, the respondents admitted committing the acts proscribed by the statute, but they alleged they were practising ancestral customs and religious rites that were the subject of a treaty between the British and the Huron, thereby affording them the protection of section 88 of the *Indian Act*. Lamer J stated:

> Our courts and those of our neighbours to the south have already considered what distinguishes a treaty with the Indians from other agreements affecting them. The task is not an easy one. In *Simon v. The Queen*, [1985] 2 S.C.R. 387, this Court adopted the comment of Norris J.A. in *R. v. White and Bob* (1964), 50 D.L.R. (2d) 613 (B.C.C.A.) (affirmed in the Supreme Court (1965), 52 D.L.R. (2d) 481), that *the courts should show flexibility in determining the legal nature of a document recording a transaction with the Indians*. In particular, they must take into account the historical context and perception each party might have as to the nature of the undertaking contained in the document under consideration.[314]

Lamer J described the constituent elements of a treaty in these terms:

> [I]t is clear that *what characterizes a treaty is the intention to create obligations, the presence of mutually binding obligations and a certain measure of solemnity*. In the Court of Appeal [in *Simon*] Bisson J.A. in fact adopted a similar approach when he wrote (at p. 1726):
>
> > [TRANSLATION] I feel that in order to determine whether document D-7 [the document of September 5, 1760] is a treaty within the meaning of s. 88 of the *Indian Act*, the fundamental question is as follows: is it an agreement in which the contracting parties . . . intended to create mutual obligations which they intended to observe solemnly?[315]

This excerpt demonstrates three criteria for determining the existence of a treaty: intention, mutuality, and solemnity. Canada has argued that a fourth criterion – the *capacity* of the assembled Pottawatomi to enter into a treaty – must also be considered. On this point, Lamer J appears to concur, as can be seen from his comments in *Sioui*:

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[314] *R. v. Sioui*, [1990] 1 SCR 1025 at 1035, Lamer J. Emphasis added.

[315] *R. v. Sioui*, [1990] 1 SCR 1025 at 1044, Lamer J. Emphasis added.

> As the Chief Justice said in *Simon*, *supra*, treaties and statutes relating to Indians should be liberally construed and uncertainties resolved in favour of the Indians (at p. 410). In our quest for the legal nature of the document of September 5, 1760, therefore, we should adopt a broad and generous interpretation of what constitutes a treaty.
>
> In my opinion, this liberal and generous attitude, heedful of historical fact, should also guide us in examining *the preliminary question of the capacity to sign a treaty*, as illustrated by *Simon* and *White and Bob*.[316]

We will deal with each of these criteria in turn shortly. First, however, we will consider what the courts have said regarding the sort of evidence we may consider in assessing these criteria.

From the first of the foregoing quotations from *Sioui*, it can be seen that we "must take into account the historical context and perception each party might have as to the nature of the undertaking contained in the document under consideration." Lamer J expanded on this point, noting that a "more flexible approach" to the use of historical evidence is to be taken in determining the *existence* of a treaty than in *interpreting* a treaty that has already been found to exist:

> As this Court recently noted in *R. v. Horse*, [1988] 1 S.C.R. 187, at p. 201, extrinsic evidence is not to be used as an aid to interpreting a treaty in the absence of ambiguity or where the result would be to alter its terms by adding words to or subtracting words from the written agreement. This rule also applies in determining the legal nature of a document relating to the Indians. However, a more flexible approach is necessary as the question of the existence of a treaty within the meaning of s. 88 of the *Indian Act* is generally closely bound up with the circumstances existing when the document was prepared (*White and Bob*, *supra*, at pp. 648-49, and *Simon*, *supra*, at pp. 409-10). In any case, the wording alone will not suffice to determine the legal nature of the document before the Court. On the one hand, we have before us a document the form of which and some of whose subject-matter suggest that it is not a treaty, and on the other, we find it to contain protection of fundamental rights which supports the opposite conclusion. The ambiguity arising from this document thus means that the Court must look at extrinsic evidence to determine its legal nature.[317]

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[316] *R. v. Sioui*, [1990] 1 SCR 1025 at 1035-36, Lamer J. Emphasis added.

[317] *R. v. Sioui*, [1990] 1 SCR 1025 at 1049, Lamer J.

As Roscoe and Bateman JJA (Flinn JA concurring) emphasized in *R. v. Marshall*:

> The "more flexible" approach referred to above, is endorsed, then, only in determining whether the document is, in fact, a treaty, rather than with respect to the interpretation of that treaty, once found to exist, in the absence of ambiguity.[318]

Justice Lamer's approach may not appear to be significantly more "flexible" if it is viewed as merely permitting the admission of extrinsic evidence where the existence of the treaty is ambiguous. Extrinsic evidence is commonly allowed to resolve ambiguity, although in most circumstances that evidence is directed to the *meaning* of the instrument rather than its *existence*. However, Lamer J also noted that the question of whether a treaty exists is "closely bound up with the circumstances existing when the document was prepared," and that "the wording alone will not suffice to determine the legal nature of the document before the Court." We take this to mean that extrinsic evidence is admissible in such circumstances not solely because of ambiguity, but because we are concerned with determining the legal significance or status of the instrument and not simply its meaning. In any event, a central issue in this inquiry is the legal significance of the promises made to the Pottawatomi in 1837, and we have no doubt that the sort of "ambiguity arising from [the] document" referred to by Lamer J in *Sioui* is also evident in this case: "On the one hand, we have before us a document the form of which and some of whose subject-matter suggest that it is not a treaty, and on the other, we find it to contain protection of fundamental rights which supports the opposite conclusion."

These principles find additional support and analysis in *R. v. Côté*,[319] in which the Quebec Court of Appeal was asked to determine whether a particular agreement between the British Crown and certain Algonquin nations in 1760 constituted a treaty as defined in section 88 of the present-day *Indian Act*. On behalf of a 2-1 majority, Baudouin JA concluded that it did:

> Concerning the proof of such treaties, the situation in aboriginal law is different from what we usually encounter. In the first place, a number of these agreements were not always reduced to writing and, in many cases, the common aboriginal custom was to acknowledge their existence through a mere exchange of wampum and to commit them to the collective memory. Furthermore, the colonizer was in most cases in a

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[318] *R. v. Marshall* (1997), 146 DLR (4th) 257 at 266 (NSCA).

[319] *R. v. Côté* (1993), 107 DLR (4th) 28 at 46 (Que. CA), Baudouin JA.

position of superiority, if only because the legal concepts used were in some cases unknown to the aboriginal people or hard to understand or grasp in their cultures. That is why the Supreme Court has established some exceptional but nevertheless precise rules in such matters, rules that are binding on the lower courts.

The first such rule is that any agreement made in principle be considered to be a true treaty even if it does not have the form of one, notwithstanding some reluctance on the part of some lower courts: see ***Delgamuukw v. British Columbia, supra***. Thus any pact, alliance, agreement or arrangement may constitute a treaty within the meaning of s. 88 of the ***Indian Act***: ***R. v. Simon, supra***; ***R. v. Sioui, supra***, at p. 441 ***et seq***. As Lamer J. wrote, in Sioui (at p. 441): ". . . what characterizes a treaty is the intention to create obligations, the presence of mutually binding obligations and a certain measure of solemnity.". . .

The second such rule is that it is sometimes necessary, in the absence of a written text acknowledging the agreement, to be content with secondary evidence, of lesser quality, hearsay evidence, and thus to derogate consciously from the ordinary rules. This principle was first laid down in ***Nowegijick v. Canada, supra***, was repeated in ***Guerin v. Canada, supra***, and was spelled out still more recently in ***Mitchell v. Peguis Indian Band, supra***. In the latter judgment, Chief Justice Brian Dickson stated in relation to the ***Nowegijick*** judgment (at p. 202):

> The ***Nowegijick*** principles must be understood in the context of this court's sensitivity to the historical and continuing status of aboriginal peoples in Canadian society . . . It is Canadian society at large which bears the historical burden of the current situation of native peoples and, as a result, the liberal interpretative approach applies to any statute relating to Indians, even if the relationship thereby affected is a private one. Underlying ***Nowegijick*** is an appreciation of societal responsibility, and a concern with remedying disadvantage, if only in the somewhat marginal context of treaty and statutory interpretation.

La Forest J., concurring but on other grounds, was of the same opinion (at p. 236):

> I note at the outset that I cannot take issue with the principle that treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians. In the case of treaties, this principle finds its justification in the fact that the Crown enjoyed a superior bargaining position when negotiating treaties with native peoples. From the perspective of the Indians, treaties were drawn up in a foreign language, and incorporated references to legal concepts of a system of law with which Indians were unfamiliar. In the interpretation of these documents it is, therefore, only just that the courts attempt to construe various provisions as the Indians may be taken to have understood them.[320]

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[320] ***R. v. Côté*** (1993), 107 DLR (4th) 28 at 46-47 (Que. CA), Baudouin JA.

Notwithstanding his finding that the agreement constituted a treaty, Baudouin JA later concluded that the province was justified in interfering with the Indians' treaty rights in that case.

On the basis of these principles, we can now consider whether the promises made by the British Crown to the ancestors of the Moose Deer Point First Nation constituted a treaty. We will assess whether the parties *intended* to create obligations, whether *mutually binding* obligations were in fact created, and whether the proceedings involved a measure of *solemnity*. First, however, in keeping with the comments of Lamer J, we will address as a preliminary issue the capacity of the parties to enter into a treaty in the first place.

Capacity to Enter into Treaty

At the outset, we should clearly state that, although Canada raises the issue of the capacity of the parties to enter into a treaty, there is no issue regarding the capacity or authority of S.P. Jarvis who, as the Chief Superintendent of Indian Affairs, was the Crown's representative at the council of 1837. As counsel for the First Nation noted, Jarvis was expressly authorized and directed by Lieutenant Governor Head to give the 1837 address that, had he not been called away owing to the death of King William IV, Head would likely have delivered himself. It was open to the Indians to assume reasonably that Jarvis had the authority to enter into treaties on behalf of the Crown,[321] and this fact has been expressly acknowledged by counsel for Canada.[322]

Where Canada differs from the First Nation is in its view of the representative capacity of the Indians in attendance at Jarvis's 1837 address to bind their nation to the fulfilment of any promises made to the Crown at that time.[323] From Canada's perspective, the First Nation faces "a real technical problem" because treaty making takes place "nation to nation," and there is no evidence of anyone in attendance at the 1837 address who could make binding promises on behalf of the present-day First Nation.[324] Canada submits that the First Nation has failed to establish that any of its ancestors were actually present during the address, or that Ogemawahj or anyone else had the authority to act on behalf of the Pottawatomi or even purported to do so.[325] Counsel stresses that those in attendance were simply "3,700 Indians of different tribes and from various regions," and that no care was taken to identify Chiefs or principal men.[326] Finally, Canada submits that cases such as *Simon*, *Sioui*, and *Mitchell* demonstrate that First Nations can rely only on promises made to "ascertainable parties," such as members of the First Nation or their ancestors; given that the parties to a treaty must have the capacity to treat, the appropriate parties are the Crown and "a tribe or nation of Indians."[327] Indeed, having regard for the social and political structures of the Pottawatomi in the early 1800s, organized as they were by village, Canada suggests that "it would have been difficult for the Pottawatomi Nation at that time to have come up with one individual with the authority to bind the whole Pottawatomi Nation."[328] In support of this statement, Canada cites anthropologist James Clifton:

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[321] Written Submission on behalf of the Moose Deer Point First Nation, August 1, 1997, p. 66; ICC Transcript, April 8, 1998, p. 84 (Gary Nelson).

[322] ICC Transcript, April 8, 1998, p. 125 (Perry Robinson).

[323] It is interesting that, having argued that there were no representatives present who could bind the First Nation to the fulfilment of promises made *to the Crown*, Canada also argues that there was none of the mutuality of consideration required for treaty making because no promises were actually made *to the Crown* in any event. We will return to this argument later in this report.

[324] ICC Transcript, April 8, 1998, p. 127 (Perry Robinson); Reply Submission on Behalf of the Government of Canada, April 1, 1998, p. 4.

> By 1820 the Potawatomi yet constituted a single segmentary tribal organization whose villages were scattered across a very extensive tribal estate. The most important economic-political-geographic unit was the village. . . . Although it has become customary for historians and anthropologists to identify a number of supposedly autonomous "bands" in this era, there is no evidence that the Potawatomi themselves recognized such formal, sub-tribal divisions, each with autonomous control over a portion of the tribal estate.[329]

Canada submits that the promises were "made to all Indians who had served as British allies, rather than to an identifiable group of Indians as was the case in both the *Sioui* and *Côté* cases," and that there is no case law indicating that "a treaty has been entered into with simply a body of assembled Indians."[330]

On the factual level, the Moose Deer Point First Nation responds that, although there may be no clear proof of Ogemawahj's presence during the 1837 address, there is evidence suggesting that he may well have been there.

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[325] Written Submission on Behalf of the Government of Canada, August 7, 1997, p. 45.

[326] ICC Transcript, April 8, 1998, p. 129 (Perry Robinson).

[327] Written Submission on Behalf of the Government of Canada, August 7, 1997, p. 44.

[328] ICC Transcript, April 8, 1998, p. 130 (Perry Robinson); Reply Submission on Behalf of the Government of Canada, April 1, 1998, p. 4.

[329] Clifton, *A Place of Refuge* (ICC Exhibit 13, p. 91); Written Submission on Behalf of the Government of Canada, August 7, 1997, p. 45.

[330] Written Submission on Behalf of the Government of Canada, August 7, 1997, p. 46; ICC Transcript, April 8, 1998, pp. 126-27.

According to the First Nation, Ogemawahj crossed the border in 1835 and resided with Chief Aisance at Coldwater and later at Christian Island. Both men were present in 1852 when Indian Superintendent T.G. Anderson announced that presents would be terminated. Counsel submits that, even if the Commission is not prepared to accept the inference that Ogemawahj attended Jarvis's address, it was in the Crown's interest to see that the substance of the address received broad publicity to all its native allies. Accordingly, it is likely that the First Nation's ancestors learned the substance of the address shortly after Jarvis spoke.[331] In any event, the First Nation appears to consider the factual question as something of a "red herring," given Canada's concession that substantially the same promises were made to Ogemawahj and other ancestors before 1837.[332]

As to Canada's argument that there can be no valid treaty unless a tribe or nation is a party, the First Nation responds that, as a matter of practice and policy, the Crown always dealt with whatever body of Indians seemed appropriate in the circumstances. Stating that negotiating with a tribe or nation was merely "a preference but not a requirement for a valid treaty," counsel referred to Treaties 4, 6, and 7 as evidence that the Crown had negotiated with groups of Indians notwithstanding that an entire nation was not present and that some of the principal men and Chiefs were absent.[333] Counsel further contends that, should negotiation with a tribe or nation be treated as a requirement of treaty making, "that would invalidate a whole slew of treaties across this entire country," and, as Canada has suggested, it would likely mean that the Pottawatomi could never have entered into a treaty at all.[334] The First Nation argues that the Crown never intended that the promises "could only be taken up by entire nations or tribes"; rather, the promises were made with the intent that they would be widely disseminated to all Britain's native allies in the United States and could be accepted by anyone – whether organized by band, clan, clan segment, or other group – who chose to settle permanently in Canada.[335] Accordingly, Canada's suggestion that treaty negotiations can involve only "ascertainable parties" is, in the First Nation's view, without merit. Citing the venerable case of *Carlill v. Carbolic*

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[331] Reply Submission on Behalf of the Moose Deer Point First Nation, April 3, 1998, pp. 5 and 12-13; ICC Transcript, April 8, 1998, pp. 40 and 45 (Gary Nelson).

[332] Reply Submission on Behalf of the Moose Deer Point First Nation, April 3, 1998, p. 13.

[333] Reply Submission on Behalf of the Moose Deer Point First Nation, April 3, 1998, pp. 14-15; ICC Transcript, April 8, 1998, pp. 180-82 (Gary Nelson).

[334] ICC Transcript, April 8, 1998, pp. 179 and 182 (Gary Nelson).

[335] Reply Submission on Behalf of the Moose Deer Point First Nation, April 3, 1998, p. 15.

Smoke Ball Company,[336] counsel argued that, although the benefits of the Crown's promises were offered widely to that large number of Indians who might accept by performance of the required condition – namely, permanent settlement in Canada – a binding agreement would only arise between the Crown and the more limited number of Indians who actually came forward and performed the condition.[337] The common law, in counsel's submission, supports contracts formed by the performance of the prescribed condition, without more being required.[338]

In reply, Canada contends that, although *Carlill* may be applicable to the creation of legal relationships between ordinary citizens, "[g]overnments cannot be bound by undertakings that are tacitly accepted by conduct."[339] In so saying, counsel relies on the following excerpt from *The Law of Contract in Canada* by G.H.L. Fridman:

> Where a government or governmental body has set out its intention of doing something, for example, paying subsidies, or allowing remission of taxes vis-à-vis members of a certain group, for example, mining companies, or to a specific person or organization, it has been held that such statements of policy, whether contained in a statute or Order in Council, or mere directive, are not offers capable of becoming binding by acceptance by words or conduct on the part of the specific addressee of the statement or any member of the group affected thereby.[340]

The First Nation counters that this excerpt relates only to the legislative branch of government dealing with non-aboriginal matters, and that it is entirely within the scope of the Crown acting in its executive capacity to make treaties with First Nations, including treaties arising from circumstances similar to those in the *Carlill* case.[341]

The arguments presented to the Commission with respect to capacity must be assessed from two perspectives. One assessment must be from the perspective of general principles of international law, considering Canada's argument that treaties must be created on a "nation-to-nation" basis. The second assessment must be from the perspective of the legal principles relating to capacity as they apply to the ability of the First Nation's ancestors to treat with representatives of the British Crown.

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[336] *Carlill v. Carbolic Smoke Ball Company*, [1893] 1 QB 256 (Eng. CA).

[337] Submission on Behalf of the Moose Deer Point First Nation, August 1, 1997, p. 68; Reply Submission on Behalf of the Moose Deer Point First Nation, April 3, 1998, p. 16; ICC Transcript, April 8, 1998, pp. 91-92 and 94 (Gary Nelson).

[338] Submission on Behalf of the Moose Deer Point First Nation, August 1, 1997, p. 71; Reply Submission on Behalf of the Moose Deer Point First Nation, April 3, 1998, p. 12.

[339] Reply Submission on Behalf of the Government of Canada, April 1, 1998, p. 12.

[340] G.H.L. Fridman, *The Law of Contract in Canada*, 2nd ed. (Toronto: Carswell, 1986) at 25.

[341] ICC Transcript, April 8, 1998, pp. 197-98 (Gary Nelson).

With regard to the first of these assessments, the cases are clear that a treaty between the Crown and its Indian subjects, as contemplated by section 88 of the *Indian Act* or subsection 35(1) of the *Constitution Act, 1982*, is quite different from an international treaty. Baudouin JA commented on this distinction in *Côté*:

> The actual notion of a treaty, in the current legal language, refers to an instrument by which the governments of two or more competent states establish rules or make certain decisions. In the context of aboriginal law, we should not confine ourselves to such a restrictive definition, if only because *the agreements signed between the French or English colonizers and particular aboriginal groups were, in most cases, agreements not between two governments of sovereign states but between a government and a nation or a part of a nation*. As the Supreme Court of Canada said in *R. v. Simon*, *supra*, a treaty with aboriginal people is a *sui generis* agreement, which does not necessarily follow the classic rules of public international law.[342]

It is noteworthy that Baudouin JA refers to an agreement "between a government and a nation *or a part of a nation*."

As we have seen, *Côté* considered the largely factual issue of whether a particular agreement between the British Crown and certain Algonquin nations in 1760 constituted a treaty under the *Indian Act*. By way of contrast, in *Mitchell v. Minister of National Revenue*,[343] McKeown J of the Federal Court, Trial Division, was called upon to consider the legal question of whether an *international* treaty can similarly be considered a "treaty" for the purposes of subsection 35(1) of the *Constitution Act, 1982*. In answering the question, McKeown J relied in part on *Francis v. R.*,[344] a case in which the Supreme Court of Canada addressed a similar question in relation to section 88 of the *Indian Act*:

> The [Ontario] Court of Appeal [in *R. v. Vincent*[345]] found that the Jay Treaty, as an international treaty, is not a treaty within the meaning of s. 35(1) of the Constitution. Section 35(1) refers only to rights arising from treaties concluded with Aboriginal peoples. . . . Section 35(1) does not create rights. It only recognizes and affirms existing rights. An international treaty is one between the nations who are parties to

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[342] *R. v. Côté* (1993), 107 DLR (4th) 28 at 46 (Que. CA), Baudouin JA. Emphasis added.
[343] *Mitchell v. Minister of National Revenue*, [1997] 4 CNLR 103 (FCTD).
[344] *Francis v. R.*, [1956] SCR 618.
[345] *R. v. Vincent* (1993), 12 OR (3d) 427, [1993] 2 CNLR 165.

> the treaty, and the rights created or conferred by an international treaty belong exclusively to the sovereign countries which are contracting parties to it. In order for individual members of those nations to have rights under the treaty, the treaty must have been implemented by national legislation. . . .
>
> This decision was based in part on the Supreme Court of Canada's decision in *Francis v. R.*, [1956] S.C.R. 618 at 631, wherein Kellock J. stated:
>
> > I think it is quite clear that "treaty" in this section [section 88 of the Indian Act] does not extend to an international treaty such as the Jay Treaty but only to treaties with Indians which are mentioned throughout the statute.
> >
> > In my opinion, the provisions of the Indian Act constitute a code governing the rights and privileges of Indians, and except to the extent that immunity from general legislation such as the Customs Act or the Customs Tariff Act is to be found in the Indian Act, the terms of such general legislation apply to Indians equally with other citizens of Canada.
>
> The Court of Appeal reviewed a number of other decisions and found that the word "treaty" has always had the meaning of a treaty between the Crown and the Indians. There is no court decision which gives it the meaning of an international treaty. . . .[346]

From the *Côté* and *Mitchell* cases, it can be seen that a treaty between the Crown and Indians is not the equivalent of a treaty in international law. As Dickson CJ stated in *Simon*, principles of international treaty law are "not determinative" because "an Indian treaty is unique; it is an agreement *sui generis* which is neither created nor terminated according to the rules of international law."[347] Nor are treaties ordinary contracts in the sense of being binding only on those signing them.[348] For these reasons, we must be wary of applying strict rules of interpretation under contract law and international law to these *sui generis* agreements, for which the courts have developed unique rules of construction and enforcement.

Having considered the applicability of principles of international law, we now turn to the application of the principles relating specifically to capacity. There are three cases of particular interest. The first is *Simon*, where Dickson CJ was required to decide whether the Treaty of 1752 was validly created by competent parties. In doing so, he felt constrained to distance himself from the widely debated 1929 Nova Scotia County Court decision in *R. v. Syliboy*,[349] in which Acting Judge Patterson made the following comments, ostensibly based on principles of international law, regarding the Indians' lack of status to enter into a treaty:

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[346] *Mitchell v. Minister of National Revenue*, [1997] 4 CNLR 103 at 180-81 (FCTD).

[347] *R. v. Simon*, [1985] 2 SCR 387 at 404, Dickson CJ.

[348] Shin Imai, Katherine Logan, and Gary Stein, *Aboriginal Law Handbook* (Toronto: Carswell, 1997), 26.

[349] *R. v. Syliboy*, [1929] 1 DLR 307 (NS Co. Ct).

> "Treaties are unconstrained Acts of independent powers." But the Indians were never regarded as an independent power. A civilized nation first discovering a country of uncivilized people or savages held such country as its own until such time as by treaty it was transferred to some other civilized nation. The savages' rights of sovereignty[,] even of ownership[,] were never recognized. Nova Scotia had passed to Great Britain not by gift or purchase from or even by conquest of the Indians but by treaty with France, which had acquired it by priority of discovery and ancient possession; and the Indians passed with it.
>
> Indeed the very fact that certain Indians sought from the Governor the privilege or right to hunt in Nova Scotia as usual shows that they did not claim to be an independent nation owning or possessing their lands. If they were, why go to another nation asking this privilege or right and giving promise of good behaviour that they might obtain it? In my judgment the Treaty of 1752 is not a treaty at all and is not to be treated as such; it is at best a mere agreement made by the Governor and council with a handful of Indians giving them in return for good behaviour food, presents, and the right to hunt and fish as usual – an agreement that, as we have seen, was very shortly after broken.[350]

In response to these reasons, Dickson CJ stated:

> It should be noted that the language used by Patterson J., illustrated in this passage, reflects the biases and prejudices of another era in our history. Such language is no longer acceptable in Canadian law and indeed is inconsistent with a growing sensitivity to native rights in Canada. With regard to the substance of Patterson J.'s words, leaving aside for the moment the question of whether treaties are international-type documents, his conclusions on capacity are not convincing.[351]

Chief Justice Dickson then referred to an article entitled "Indians and Treaties in Law" in which N.A.M. MacKenzie, in disagreement with the ruling of Patterson J that the Indians did not have the capacity to conclude a valid treaty, stated:

> As to the capacity of the Indians to contract and the authority of Governor Hopson to enter into such an agreement, with all deference to His Honour, both seemed to have been present. Innumerable treaties and agreements of a similar character were made by Great Britain, France, the United States of America and Canada with the Indian tribes inhabiting this continent, and these treaties and agreements have been and still

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350 *R. v. Syliboy*, [1929] 1 DLR 307 (NS Co. Ct) at 313-14.
351 *Simon v. The Queen*, [1985] 2 SCR 387 at 399, Dickson CJ.

> are held to be binding. . . . Ordinarily "full powers" specially conferred are essential to the proper negotiating of a treaty, but the Indians were not on a par with a sovereign state and fewer formalities were required in their case.[352]

Dickson CJ then concluded:

> The Treaty was entered into for the benefit of both the British Crown and the Micmac people, to maintain peace and order as well as to recognize and confirm the existing hunting and fishing rights of the Micmac. In my opinion, both the Governor and the Micmac entered into the Treaty with the intention of creating mutually binding obligations which would be solemnly respected. It also provided a mechanism for dispute resolution. The Micmac Chief and the three other Micmac signatories, as delegates of the Micmac people, would have possessed full capacity to enter into a binding treaty on behalf of the Micmac.[353]

It is noteworthy that, after quoting the excerpt from MacKenzie's article, Dickson CJ did not dispute the statement that "the Indians were not on a par with a sovereign state and fewer formalities were required in their case." We infer that the more important feature of the negotiations was the intention to create mutually binding obligations that would be solemnly respected. While Dickson CJ referred to the Chief and three other Micmac signatories "as delegates of the Micmac people" with "full capacity to enter into a binding treaty on behalf of the Micmac," we do not take him to have ruled that, in appropriate circumstances, other delegates could not have been selected by the Micmacs, or other informal means of concluding a treaty could not have been chosen.

The second case to offer relevant discussion on the question of the Indians' capacity to enter into a treaty is *Sioui*. Although that case involved an actual document, the Province of Quebec argued that the document did not constitute a treaty, in part because the Huron Indians lacked the capacity to enter into one. In finding that the Indians in fact had the requisite capacity, Lamer J differentiated between the requirements for capacity in the context of international treaties between European nations, and the lesser requirements in the context of relations between a European nation and the aboriginal peoples of North America:

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[352] N.A.M. MacKenzie, "Indians and Treaties in Law" (1929), 7 *Can. Bar Rev.* 561 at 565.
[353] *Simon v. The Queen*, [1985] 2 SCR 387 at 401, Dickson CJ.

> Such a document could not be regarded as a treaty so far as the French and the Canadians were concerned because under international law they had no authority to sign such a document: they were governed by a European nation which alone was able to represent them in dealings with other European nations for the signature of treaties affecting them. The colonial powers recognized that the Indians had the capacity to sign treaties directly with the European nations occupying North American territory. The *sui generis* situation in which the Indians were placed had forced the European mother countries to acknowledge that they had sufficient autonomy for the valid creation of solemn agreements which were called "treaties", regardless of the strict meaning given to that word then and now by international law. ***The question of the competence of the Hurons and of the French or the Canadians is essential to the question of whether a treaty exists. The question of capacity has to be examined from a fundamentally different viewpoint and in accordance with different principles for each of these groups.*** Thus, I reject the argument that the legal nature of the document at issue must necessarily be interpreted in the same way as the capitulations of the French and the Canadians. The historical context which I have briefly reviewed even supports the proposition that both the British and the Hurons could have intended to enter into a treaty on September 5, 1760. I rely, in particular, on Great Britain's stated wish to form alliances with as many Indians as possible and on the demoralizing effect for the French, the Canadians and their allies which would result from the loss of this long-standing Indian ally whose allegiance to the French cause had until then been very seldom shaken.[354]

A similar philosophy was expressed by McKeown J in the final case – *Mitchell* – where the question was whether certain international treaties – the Treaty of Utrecht (1713), the Jay Treaty (1794), and the Treaty of Ghent (1814) – in conjunction with a series of meetings or councils between the British Crown and First Nations held to explain those treaties, constituted "a source of recognition and protection of pre-existing rights, an independent source of treaty rights, a source of positive protection for . . . Aboriginal rights, a source of positive duties and obligations on the British Crown, and a constraint on the Crown in the nature of estoppel in international law."[355] McKeown J concluded that this amalgam of events did not amount to "treaty rights" under subsection 35(1) of the *Constitution Act, 1982*, at least in part because the Indians were not parties to the three international treaties, nor were they involved in their negotiation, execution, or termination. The plaintiff Indians argued, however, that, although no First Nations had been involved in the negotiation of the international treaties, the *Vienna Convention on the Law of Treaties* provided that rights in favour of a third party –

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[354] *R. v. Sioui*, [1990] 1 SCR 1025 at 1056, Lamer J. Emphasis added.

[355] *Mitchell v. Minister of National Revenue*, [1997] 4 CNLR 103 at 104 (headnote) (FCTD).

including, according to the plaintiffs, an Indian nation – will arise from a treaty if such was the intention of the parties. Moreover, the plaintiffs contended that such rights, once created, cannot be altered in any way without the consent of the third party if it is established that such was the intention of the parties to the treaty. To this submission McKeown J responded:

> Under the *Vienna Convention on the Law of Treaties*, a third party being referred to is a third State. Article 34 of the Convention reads:
>
> > A treaty does not create either obligations or rights for a third State without its consent.
>
> The plaintiff submitted that whether the Indian Nations were recognized as States is irrelevant, as formal requirements of statehood were not a necessary requirement of British treaty making in the mid-18th and 19th centuries. Formal requirements of statehood may not have been a necessary requirement, however, in my view, *the British Crown considered the First Nations to be British subjects and not independent nations or states. The capacity of First Nations to enter into treaties with European powers has long been recognized in Canada*, however, this does not change the requirement that states creating [a] treaty provision in favour of a third state must demonstrate the intention to do so. It follows, that the British Crown would have to have viewed the First Nations as independent nations or states.
>
> *I recognize that the First Nations were often referred to as "brothers", and that the plaintiff's experts testified that the First Nations were viewed as independent peoples, however, in my view, the conduct of the British Crown toward the First Nations during that period demonstrates that it did not view them as independent nations or states. . . .*[356]

The *Sioui* and *Mitchell* cases underscore the *sui generis* nature of the relationship between the Indians and the European nations occupying North American territory. The historical context dictated that, to permit binding treaty agreements to be entered into with the Indians, it was necessary for the Europeans to adapt the formal treaty-making requirements of international law to the circumstances of the Indians as the Europeans found them. Apparently, the British Crown did not view the Indians as nations or states, yet it was prepared to negotiate *sui generis* "treaties" with them. Using Justice Lamer's terminology, it seems evident that the British were prepared to treat the question of capacity in accordance with different principles for the Indians than for international treaty-making powers.

In this context, we find that the First Nation's argument regarding the circumstances surrounding the negotiation of Treaties 4, 6, and 7, and in particular with respect to the willingness of the Crown to negotiate in the absence of Chiefs and principal men, carries considerable weight. In previous inquiries we have observed the willingness of the Crown to deal with whatever representatives First Nations have been prepared to allow to speak on their behalf. We see no reason to conclude that, in the absence of their Chiefs, including Ogemawahj (assuming that he *was* absent), the Indians who assembled before Jarvis in 1837 could not have likewise chosen other representatives to bind them with respect to any obligations undertaken.

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[356] *Mitchell v. Minister of National Revenue*, [1997] 4 CNLR 103 at 183 (FCTD). Emphasis added.

It is important to recognize, however, that the negotiations in this case were somewhat different from the discussions that may have occurred in more typical treaty negotiation situations. We accept that the common perception of negotiation is a process of give and take, with offers and counter-offers until the parties are prepared to agree on a mutually satisfactory compromise. That is not to say, however, that compromise is an essential element of negotiation. It is always open to one party to negotiate by ultimatum – that is, to state a single or final position that it is prepared to accept and to invite the other party to "take it or leave it." We see Jarvis's 1837 address as having very much this sort of character. Clearly, it was open to the Indians to respond in at least two ways: they could signal their refusal by returning to the United States, or they could accept by remaining in Canada. Presumably, they might also have responded by other means, such as proposing other terms or going to war, but, as neither of these alternatives seems to have been pursued, they need not be discussed further. Subject to our comments regarding mutuality and intention, we see nothing in Jarvis's address to suggest a need for acceptance by designated representatives. Rather, the Crown intended that Jarvis's address would be acted upon, and that certain rights and obligations would flow from the decisions made by ***individual*** Indians.

In the Commission's report dealing with the treaty land entitlement claim of the Fort McKay First Nation, we referred to the decision of Mahoney J of the Federal Court, Trial Division, in *R. v. Blackfoot Band of Indians*.[357] Although he recognized that the Treaty 7 Indians were represented by Chiefs and councillors during their negotiations with the Crown's officers, Mahoney J emphasized that the aboriginal parties to the treaty were individual Indians:

> It is clear from the preamble that the intention was to make an agreement between Her Majesty and all Indian inhabitants of the particular geographic area, whether

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[357] *R. v. Blackfoot Band of Indians*, [1982] 4 WWR 230, [1982] 3 CNLR 53 (FCTD).

> those Indians were members of the five bands or not. The chiefs and councillors of the five bands were represented and recognized as having authority to treat for all those individual Indians. *The treaty was made with Indians, not with bands. It was made with people, not organizations.*[358]

The Commission found further support for this conclusion in Justice Mahoney's analysis of the treaty's substantive provisions:

> It was Indians, not bands, who ceded the territory to Her Majesty and it was to Indians, not bands, that the ongoing right to hunt was extended. The cash settlement and treaty money were payable to individual Indians, not to bands. The reserves were established for bands, and the agricultural assistance envisaged band action, but its population determined the size of its reserve and the amount of assistance.[359]

We do not believe that it is necessary for us to determine whether the Crown must be considered to have dealt with individual Indians in all cases, or whether it was possible that in some cases it might be concluded that the Crown has treated with entire Indian nations. From the statements in the *Blackfoot Band* case, it can be seen that the Crown there considered itself to be dealing with individual Indians, notwithstanding that, depending on the circumstances, the Indians might have negotiated through representatives such as Chiefs, headmen, or others. Similarly, as we have seen, Baudouin JA of the Quebec Court of Appeal in *Côté* acknowledged that "the agreements signed between the French or English colonizers and particular aboriginal groups were, in most cases, agreements not between two governments of sovereign states but between a government and a nation or *a part of a nation*."[360]

In this light, we must conclude that, at least in some cases, it was individual Indians and their descendants who became bound, not their representatives in the negotiations and not organizational units such as clans, clan segments, villages, bands, or nations. Treaties with the Indians, being *sui generis*, are not necessarily negotiated on a nation-to-nation basis as Canada suggests, and on the facts of this case we are inclined to believe that the Crown intended that its offer might be accepted by some members of a clan, village, or nation and rejected by others. There is nothing in the evidence to indicate that the offer was an "all or nothing" proposition requiring an entire

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358 *R. v. Blackfoot Band of Indians*, [1982] 4 WWR 230, [1982] 3 CNLR 53 at 61 (FCTD). Emphasis added.

359 *R. v. Blackfoot Band of Indians*, [1982] 4 WWR 230, [1982] 3 CNLR 53 at 61 (FCTD). Paragraph references omitted.

360 *R. v. Côté* (1993), 107 DLR (4th) 28 at 46 (Que. CA), Baudouin JA. Emphasis added.

nation to decide to locate in either Canada or the United States. Indeed, the Crown anticipated considerable cost savings based on the expectation that, even if significant numbers of Indians initially moved to Canada, few would stay.

Finally, as Canada states in its submission, "the promises were made to all Indians who had served as British allies."[361] Therefore, although no document has been put forward naming the representatives of each nation in attendance at the 1837 council, such a link would seem unnecessary given that the promises were admittedly intended to apply to all Indian allies, including the Pottawatomi. Although the persons in attendance at the 1837 address may or may not have been the direct ancestors of the Moose Deer Point First Nation, those in attendance at the 1836 council likely were, as Canada has admitted.[362] Canada has also accepted as accurate the conclusion of Joan Holmes and Associates in 1994 that the Indians currently residing at Moose Deer Point have descended from Chief Ogemawahj and the other Pottawatomi who migrated to Canada in the 1830s or 1840s.[363]

We agree with the First Nation's submission that the Crown intended the promises made by Jarvis in 1837 to be widely disseminated. Therefore, we conclude, based on the reasons of the Supreme Court of Canada in *Simon*, that the Moose Deer Point First Nation has established not only capacity but a sufficient connection with the Pottawatomi in attendance in 1837 to be able to claim the benefit of any promises made that might be considered treaty promises. In *Simon*, Dickson CJ stated:

> The Micmac signatories were described as inhabiting the eastern coast of Nova Scotia. The appellant admitted at trial that he was a registered Indian under the Indian Act and was an "adult member of the Shubenacadie Indian Brook Band of Micmac Indians and was a member of the Shubenacadie Band Number 02". . . . This evidence alone, in my view, is sufficient to prove the appellant's connection to the tribe originally covered by the Treaty. *True, this evidence is not conclusive proof that the appellant is a direct descendant of the Micmac Indians covered by the Treaty of 1752. It must, however, be sufficient, for otherwise no Micmac Indian would be able to establish descendancy. The Micmacs did not keep written records. Micmac traditions are largely oral in nature. To impose an impossible burden of proof would, in effect, render nugatory any right to hunt that a present day Shubenacadie Micmac Indian would otherwise be entitled to invoke based on this Treaty.*[364]

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[361] Written Submission on Behalf of the Government of Canada, August 7, 1997, p. 46.

[362] Written Submission on Behalf of the Government of Canada, August 7, 1997, p. 31.

[363] Joan Holmes & Associates, Inc., "Moose Deer Point I.R. No. 79 Report," October 1994 (ICC Exhibit 2, p. 15); Written Submission on Behalf of the Government of Canada, August 7, 1997, pp. 30-31.

[364] *Simon v. The Queen*, [1985] 2 SCR 387 at 407-08. Emphasis added.

We consider that this analysis applies with equal weight to the circumstances of the present inquiry. Given that the Crown's 1837 address was directed to all Indian allies in the United States, we believe that the connection between the address and the allies – even those who were not in attendance – was sufficient.

We turn now to the three tests posed by Lamer J in *Sioui* to determine the existence of a treaty: "the intention to create obligations, the presence of mutually binding obligations, and a certain measure of solemnity." We will consider the last of these tests first.

Solemnity

The Moose Deer Point First Nation submits that there was sufficient solemnity and formality in Jarvis's address to support a conclusion that the Crown and the Indians in fact entered into a treaty:

> It was the intention of the Crown that the U.S. native allies should understand the address as a formal undertaking. It was customary to deliver wampum belts, medals and flags to denote important undertakings. In 1836, Lieutenant-Governor Bond Head explained in detail his understanding of the practice of signifying solemn promises by delivering wampum belts and the importance attached to these formalities by the tribes. In 1837, the Chief Superintendent [Jarvis] specifically announced to those present at Manitoulin Island that a silk flag was being given to them by Lieutenant-Governor Bond Head as a token of the declaration made. The flag was flying at Manitoulin Island in 1837 and was delivered to the Odawa tribe then residing on the island "who came forward and received it with great ceremony."[365]

Counsel argues that the Indians regarded the address as the "word of the white man" – a formal undertaking to be accepted or rejected.[366] In the First Nation's view, the honour and good faith of the Crown required it to provide refuge and assistance to Indians displaced from their lands in the United States who had been allies of the Crown for decades.[367]

Canada does not deny that the 1837 address was a solemn occasion, but argues that solemnity can equally be present at meetings *not* involving treaties, as at treaty councils. For example, in *Mitchell*, the Indian plaintiffs argued that the five councils held to explain the impact of the Treaty of Utrecht, the Jay Treaty, and the Treaty of Ghent should, in and of themselves, constitute a treaty with the Indians. In concluding that the councils did not amount to a treaty, McKeown J commented:

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[365] Written Submission on Behalf of the Moose Deer Point First Nation, August 1, 1997, pp. 66-67.
[366] Written Submission on Behalf of the Moose Deer Point First Nation, August 1, 1997, pp. 67, 69.
[367] Written Submission on Behalf of the Moose Deer Point First Nation, August 1, 1997, p. 69.

> I accept the plaintiff's evidence describing the protocol followed at these meetings and I accept that this protocol is consistent with that used by First Nations in treaty councils, however, the plaintiff's witnesses also stated that the protocol was often followed in meetings that did not involve treaties.
>
> The Crown representatives would have been viewed by the First Nations present at these meetings as authorized to speak for the Crown and the First Nations had the capacity to enter into treaties, however, the evidence does not support an intention on the part of the Crown to create a treaty with the Mohawks of Akwesasne, nor does the evidence demonstrate an exchange of promises by the parties.[368]

Clearly, McKeown J was alive to all the tests developed by the Supreme Court of Canada in *Sioui*, including capacity, solemnity, mutuality, and intention. However, although he was prepared to find the required capacity and solemnity to support the existence of treaty, he found that, in the circumstances of that case, the parties did not intend to enter into a treaty or to exchange mutual promises. In the result, the Indians' claim failed.

Canada also argues that, to date, no court has held a purely oral arrangement to be a treaty, and that oral promises may at most give rise to an enforceable contract or agreement.[369] Although counsel acknowledges that the lack of a written document in this case may not be fatal to the First Nation's claim – and indeed that the Quebec Court of Appeal in *Côté* decided that an oral arrangement for which there was no written record could serve as a treaty – the failure to reduce the agreement to writing might indicate that the parties did not intend to formalize their relationship as a treaty.[370]

In response to these submissions, the First Nation contends that the Crown's treaties with its native allies before 1837 "were all completed orally with the expectation that the tribes would confirm the arrangements with their actions, that is, by giving military support to the Crown as needed."[371] Furthermore, the First Nation notes that requiring a treaty to be documented would be inappropriate, given, first, Lieutenant Governor Head's explanation in 1836 of the formalities attending the making of solemn engagements between the Crown and the Indians, and, second, the indications that the councils of that year and 1837 featured such formalities.[372] The fact that there was no document does not mean, in the First Nation's submission, that the Crown's dealings with the Indians should be considered any less effective as a treaty, particularly in light of the following statement by Norris JA in ***White and Bob***, as quoted by Lamer J in *Sioui*:

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[368] *Mitchell v. Minister of National Revenue*, [1997] 4 CNLR 103 at 184 (FCTD).

[369] Written Submission on Behalf of the Government of Canada, August 7, 1997, pp. 43-44.

[370] Written Submission on Behalf of the Government of Canada, August 7, 1997, p. 44.

[371] Written Submission on Behalf of the Moose Deer Point First Nation, August 1, 1997, p. 70.

> In view of the argument before us, it is necessary to point out that on numerous occasions in modern days, rights under what were entered into with Indians as solemn engagements, although completed with what would now be considered informality, have been whittled away on the excuse that they do not comply with present day formal requirements and with rules of interpretation applicable to transactions between people who must be taken in the light of advanced civilization to be of equal status. Reliance on instances where this has been done is merely to compound injustice without real justification at law. . . . *The nature of the transaction itself was consistent with the informality of frontier days in this Province and such as the necessities of the occasion and the customs and illiteracy of the Indians demanded.*[373]

Looking first at the question of whether a treaty can be found to exist in the complete absence of a written treaty document, we turn to cases that offer guidance. For example, in *R. v. Jones and Nadjiwon*,[374] the court found that certain oral promises made by Lieutenant Governor Head to the Saugeen people at the 1836 Manitoulin council formed part of Treaty 45½, even though those promises, which related to fishing, were not recorded in the treaty text.[375] The case might be distinguished on the basis that there actually was a written component to the treaty, but we consider it significant that, despite the silence of the treaty on the fishing issue, the court upheld the oral promises on the basis that they reflected the understanding and intention of the parties at the time of treaty.

The courts have repeatedly referred to the *sui generis* nature of treaties, and the unique circumstances that surround them, at times implying that an oral agreement might well constitute a treaty. For example, the Supreme Court of Canada, when reviewing the various principles of treaty interpretation in *R. v. Badger*,[376] implied through the disjunctive use of "treaty" and

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[372] Reply Submission on Behalf of the Moose Deer Point First Nation, April 3, 1998, pp. 13-14.

[373] *R. v. White and Bob* (1964), 50 DLR (2d) 613 at 649 (BCCA), Norris JA, affirmed (1965), 52 DLR (2d) 481 (SCC); *R. v. Sioui*, [1990] 1 SCR 1025 at 1044, Lamer J. Emphasis added.

[374] *R. v. Jones and Nadjiwon* (1993), 14 OR (3d) 421.

[375] These promises were referred to in a dispatch from Head to London, but not mentioned in the treaty text itself: *R. v. Jones and Nadjiwon* (1993), 14 OR (3d) 421 at 437 and 439.

[376] *R. v. Badger*, [1996] 1 SCR 771.

"document" that a treaty can be something other than a document, and that the real issue to be determined by the Court is whether solemn promises were exchanged. Remarking that "a treaty represents an exchange of solemn promises between the Crown and the various Indian nations," and is therefore "sacred" in nature, Cory J (La Forest, L'Heureux-Dubé, Gonthier, and Iacobucci JJ concurring) reasoned that "any ambiguities or doubtful expressions in the wording of the treaty ***or document*** must be resolved in favour of the Indians.[377]

Perhaps more significant, Cory J added that "***treaties***, as written documents, ***recorded an agreement that had already been reached orally*** and they did not always record the full extent of the oral agreement."[378] In a separate concurring judgment, Sopinka J (Lamer CJ concurring) stated:

> [T]he principles . . . [of treaty interpretation] arise out of the nature of the relationship between the Crown and aboriginal peoples with the result that ***whatever the document in which that relationship has been articulated***, the principles should apply to the interpretation of that document.[379]

In other words, the principles of treaty interpretation will apply to any document articulating the relationship between the Crown and Indian peoples. Based on Justice Cory's words, the agreement exists ***before*** being recorded in written form; presumably, such an agreement, once formed, can ***continue*** to exist even if the parties fail in whole or in part to reduce it to writing, but instead record some or all of it by other means such as wampum or perhaps the collective memories of the parties. If, in fact, the defining feature of a treaty is the ***substance of the relationship*** between the Crown and aboriginal peoples, rather than the ***nature of the medium*** in which that relationship is articulated, then, provided the requisite conditions of treaty making are met, there would seem to be nothing to preclude any instrument that records that relationship from being properly construed as a treaty, whatever form that instrument may take.

By way of illustration, in *Sioui*, a dispatch of September 5, 1760, issued unilaterally and signed only by the adjunct to General Murray, giving orders to British soldiers to guarantee safe passage to the Hurons on their journey home to Lorette, was determined by the Supreme Court of Canada to constitute a treaty. The document was an administrative order to the British soldiers. It had not been assented to by the Hurons, and did not bear their signatures or totem marks, nor did it reflect a mutual exchange of promises. The Court nonetheless held that the transaction recorded therein constituted a treaty. The reference by Lamer J to the transaction as being of greater importance than the document in which it was recorded is noteworthy:

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[377] *R. v. Badger*, [1996] 1 SCR 771 at 793-94, Cory J. Emphasis added.
[378] *R. v. Badger*, [1996] 1 SCR 771 at 798, Cory J. Emphasis added.
[379] *R. v. Badger*, [1996] 1 SCR 771 at 782, Sopinka J. Emphasis added.

> [T]he courts should show flexibility in determining the legal nature of a document *recording a transaction with the Indians*. In particular, they must take into account the historical context and perception each party might have as to the nature of the undertaking contained in the document under consideration.[380]

Despite the Crown's argument in Sioui that the document was not a treaty, the Court held that the dispatch reflected the result of negotiations between the parties. It was therefore not a unilateral act, but the "embodiment of an agreement reached between the representative of the British Crown and the representatives of the Indian Nations present."[381]

In *R. v. Vincent*,[382] the Ontario Court of Appeal considered the question of whether the Jay Treaty was a treaty within the meaning of subsection 35(1) of the *Constitution Act, 1982*. The Court found that no historical fact satisfying the criteria laid out in *Sioui* had been placed in evidence. However, in making this finding, the court referred specifically to a lack of evidence supporting either a written *or an oral* treaty,[383] again suggesting that an oral agreement might itself constitute a treaty.

Perhaps the most significant case on this point is *Côté*, in which, as we have already seen, Baudouin JA stated:

> Concerning the proof of such treaties, the situation in aboriginal law is different from what we usually encounter. *In the first place, a number of these agreements were not always reduced to writing and, in many cases, the common aboriginal custom was to acknowledge their existence through a mere exchange of wampum and to commit them to the collective memory*. Furthermore, the colonizer was in most cases in a position of superiority, if only because the legal concepts used were in some cases unknown to the aboriginal people or hard to understand or grasp in their cultures. That is why the Supreme Court has established some exceptional but nevertheless precise rules in such matters, rules that are binding on the lower courts.
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> The first such rule is that *any agreement made in principle be considered to be a true treaty even if it does not have the form of one*, notwithstanding some reluc-

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[380] *R. v. Sioui*, [1990] 1 SCR 1025 at 1035. Emphasis added.

[381] *R. v. Sioui*, [1990] 1 SCR 1025 at 1057.

[382] *R. v. Vincent* (1993), 12 OR (3d) 427, leave to appeal to SCC refused.

[383] *R. v. Vincent* (1993), 12 OR (3d) 427 at 443.

> tance on the part of some lower courts: see *Delgamuukw v. British Columbia, supra*. *Thus any pact, alliance, agreement or arrangement may constitute a treaty* within the meaning of s. 88 of the *Indian Act*: *R. v. Simon*, *supra*; *R. v. Sioui*, *supra*, at p. 441 *et seq*. As Lamer J. wrote, in *Sioui* (at p. 441): ". . . what characterizes a treaty is the intention to create obligations, the presence of mutually binding obligations and a certain measure of solemnity.". . .
>
> The second such rule is that *it is sometimes necessary, in the absence of a written text acknowledging the agreement, to be content with secondary evidence, of lesser quality*, hearsay evidence, and thus to derogate consciously from the ordinary rules.[384]

As we have already stated, Canada acknowledges that *Côté* establishes that a treaty may be found to exist even in the absence of a written record. In light of this concession and the foregoing authorities, the Commission feels confident in concluding that the absence of a written treaty document does not lead to the inescapable conclusion that a treaty does not exist. We note Canada's point that the absence of a document may indicate that the parties did not *intend* to enter into a treaty, and we will address that issue shortly.

On the question of solemnity, the formality of the 1837 address by Jarvis is well documented in Anna Jameson's first-hand account of the event, which she described as the "Grand Council."[385] The Commission also notes that the solemnity of the councils in both 1836 and 1837, as well as similar councils over the preceding 50 years, has already been admitted by Canada:

> A review of Bond Head's despatch and of the historical context would lead one to believe that the parties intended the promises to be acted upon. *The promises were made by senior British officials and appear to have been made at formal councils with the Indians, who recorded the existence of the promises by the use of Wampums*. Britain required the assistance of the Indians in order to protect Upper Canada from American hostilities. The Indians relied on British promises of protection after the wars had ended.[386]

It will be recalled that Head's 1836 dispatch referred to by Canada in this passage described the Indians' view of the strength of the obligations created by oral pledges secured by the delivery of wampums:

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[384] *R. v. Côté* (1993), 107 DLR (4th) 28 at 46-47 (Que. CA), Baudouin JA. Emphasis added.

[385] Jameson, *Winter Studies and Summer Rambles* (ICC Exhibit 20).

[386] Written Submission on Behalf of the Government of Canada, August 7, 1997, p. 48. Emphasis added.

> An Indian's word when it is formally pledged, is one of the strongest moral securities on earth, like the rainbow it beams unbroken when all beneath is threatened with annihilation.
>
> The most solemn form in which an Indian pledges his word, is by the delivery of a Wampum belt of Shells, and when the purport of this symbol is once declared, it is remembered and handed down from father to son, with an accuracy and retention of meaning which is quite extraordinary.
>
> Whenever the belt is produced, every minute circumstance which attended its delivery seems instantly to be brought to life, and such is the singular effect produced on the Indian's mind by this talisman, that it is common for him, whom we term "the Savage" to shed tears at the sight of a Wampum which has accompanied a message from his friend.[387]

Although Canada proceeds to argue that the overall historical context leads to a conclusion that the promises were not intended to constitute a treaty, it again bases that submission on intent and not on a lack of solemnity. As we stated above, we will come to the issue of intent later in this report. For now, it is safe to conclude that both parties appear to recognize that the promises were couched in that "certain measure of solemnity" required to satisfy the test identified by Lamer J in *Sioui*.

We turn now to another of those tests – the presence of mutually binding obligations.

Mutuality

Canada argues that the events of 1837 did not give rise to a treaty because there is no evidence of *negotiations* or an *exchange of promises* between the Crown and the Indians that would result in each party acquiring the benefits – and assuming the obligations – inherent in treaty making. Rather, according to Canada, Jarvis's address was simply a unilateral announcement of the end of presents to Indians residing in the United States;[388] the Indians were "clearly and officially informed" of a change in policy, and there were no negotiations that might have signalled a mutual exchange of promises.[389]

Canada further submits that Britain's relations with the United States had been largely peaceful for the 25 years preceding Jarvis's address, and therefore the need for Britain to "cultivate" good relations with its native allies had become largely unnecessary by 1837. Indeed, American expansion to the west, coupled with that country's Indian removal legislation, led to growing pressure from the United States on Britain to end its practice of giving presents to Indians who might use those resources to oppose American policy. According to counsel for Canada, by 1837 circumstances had changed: while Britain was no longer looking for anything from its native allies south of the border, the Indians were in desperate need of asylum.[390] In Canada's submission, all the benefits were flowing one way – from the Crown to the Indians[391] – and, that being the case, the 1837 council thus lacked the necessary *quid pro quo* from the Indians to satisfy the treaty requirement for mutually binding obligations as set forth in *Simon*, *Sioui*, and *Mitchell*.[392]

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[387] Sir F.B. Head to Lord Glenelg, November 20, 1836 (ICC Documents, p. 13).

[388] Reply Submission on Behalf of the Government of Canada, April 1, 1998, p. 9.

[389] ICC Transcript, April 8, 1998, pp. 134-35 (Perry Robinson); Reply Submission on Behalf of the Government of Canada, April 1, 1998, p. 7.

In reply, the First Nation contends that, in return for the promises made to the Indians, the consideration flowing to the Crown was "greater security in its relations with the United States" which, as a "matter of state," was of considerable significance to Britain.[393] The American Indians also acted to their detriment by giving up their land surrender payments in the United States to move north[394] in reliance on these promises, preferring the "known certainty" of presents to the perceived uncertainty of the payments from the American government.[395] Moreover, the First Nation argues that the enlistment of Indian support – likely including Ogemawahj, according to pay records – to quell the rebellion of 1837 demonstrates that the Indians' military services were still required and constituted yet another form of consideration.[396] In any event, although there may not have been the sort of negotiations that might normally exist in treaty making, the First Nation submits that such a lack of negotiation was typical of Indian treaties in those days, when the Crown's representatives often arrived with the treaty text already in hand.[397] In counsel's view, there was clearly an offer to be accepted or rejected, with the intention that any resulting agreement would form the basis for a long-term relationship, and it was open to the Indians to "vote with their feet" by either moving to Canada or remaining in the United States.[398]

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[390] Reply Submission on Behalf of the Government of Canada, April 1, 1998, pp. 10-11; ICC Transcript, April 8, 1998, p. 141 (Perry Robinson).

[391] ICC Transcript, April 8, 1998, p. 136 (Perry Robinson).

[392] Reply Submission on Behalf of the Government of Canada, April 1, 1998, p. 9.

[393] Written Submission on Behalf of the Moose Deer Point First Nation, August 1, 1997, p. 68; ICC Transcript, April 8, 1998, pp. 86-87 (Gary Nelson).

[394] ICC Transcript, April 8, 1998, pp. 88 and 93 (Gary Nelson).

[395] Written Submission on Behalf of the Moose Deer Point First Nation, August 1, 1997, p. 69; ICC Transcript, April 8, 1998, pp. 56-57, 88 (Gary Nelson).

[396] ICC Transcript, April 8, 1998, pp. 72-73, 194 (Gary Nelson).

[397] ICC Transcript, April 8, 1998, pp. 185-86 (Gary Nelson).

[398] ICC Transcript, April 8, 1998, pp. 85, 186-87 (Gary Nelson).

In the Commission's view, Canada's contention that there was no mutuality in the 1837 council is without merit. We have already stated why we consider that negotiations took place, albeit by ultimatum, and we also consider that there was a mutual exchange of consideration. This is amply demonstrated in the continuing readiness of Britain's Indian allies to act in defence of Canada, as illustrated by their response to the Rebellion in late 1837 and 1838. The threat of the American presence to British North America was still clearly evident, notwithstanding Canada's urgings – with the benefit of considerable hindsight – to the contrary. It seems apparent that the Indians still considered themselves honour-bound to uphold their end of the longstanding arrangement to provide military services in exchange for presents. There may have been ongoing commercial relations between the Indians and the Crown as well, although the evidence before the Commission on this point is sketchy. Nevertheless, the availability of the Indians to take up arms against invaders is sufficient in and of itself to constitute the necessary *quid pro quo* required to support the existence of a treaty in this case.

In addition, however, there was at least one other form of consideration arising out of the 1837 council and flowing from the Indians to the Crown. To understand this point, it is important that the 1837 council be assessed in the proper light.

Canada has emphasized that the mutuality aspect of the claim must be considered in its historical context, and suggests that, as a result of changing circumstances, Britain no longer required the Indians' services as military allies. In light of the 1837 rebellion, we do not consider this to be true. What is more important, however, is that it was often changing circumstances that actually *gave rise* to many treaties.

In western Canada, for example, as the Commission has seen in earlier inquiries, the changing circumstances included the arrival of settlers and the discovery of gold, and these circumstances caused the Crown to enter into treaties with the Indians to *confirm* or *change* the nature of their relationship. The Indians generally had something the Crown wanted, and in most cases it was land. In some cases, however, the object of the Crown's desire was something else; as Lamer J stated in *Sioui*, "[t]here is no reason why an agreement concerning something other than a territory, such as an agreement about political or social rights, cannot be a treaty within the meaning of s. 88 of the *Indian Act*."[399]

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[399] *R. v. Sioui*, [1990] 1 SCR 1025 at 1043.

In the case of Britain's Indian allies residing in the United States, what they had was not land but something they had been receiving from the Crown for over 70 years – presents. As anthropologist James Clifton has written:

> Presents were needed to encourage the start of an alliance with newly contacted tribes, to sustain relationships with established allies, to meet the competition from rival powers, and to woo away the allies of the enemy. They were employed to lure warriors from their hunting grounds in preparation for battle, to forestall later desertions, to celebrate and reward victories, to console survivors for their wounds and casualties and to formalize peace councils.[400]

It is easy to envision the British providing presents to their Indian allies for more than one, if not all, of these reasons. Presents were an integral part of British policy during its wars with France in North America prior to the latter's defeat in 1760, and the French themselves had given presents for many years before that. Britain continued the practice with the extension of the Covenant Chain and the delivery of the wampum belt by Sir William Johnson at Niagara in 1763, the renewal of these pledges by his son, Sir John Johnson, in 1786, and the reaffirmation of the promises by Robert Dickson during the War of 1812. The councils in 1836 and 1837 involving Lieutenant Governor Head and Chief Superintendent Jarvis were merely the latest in a long line of dealings between Britain and the Indians on the question of presents. By that time, Britain's view of its *existing* obligations regarding presents was clearly set forth in Head's dispatch in 1836, in which he discussed the earlier ceremonies involving the Johnsons and Dickson:

> These rude ceremonies had probably little effect upon our officers, but they sunk [sic] deep in the minds of the Indians. The Wampums thus given, have been preserved and are now entrusted to the keeping of the great Orator, Liginish, who was present at the Council I attended on the Manitoulin Island in Lake Huron, and in every sense, these hieroglyphics are moral affidavits of the bygone transactions to which they relate. On our part, little or nothing documentary exists – the promises which were made, whatever they might have been, were almost invariably verbal, those who expressed them are now mouldering in their graves. However, the regular delivery of the presents, proves and corroborates the testimony of the Wampums, and by whatever sophistry we might deceive ourselves, we could never succeed in explaining to the Indians of the United States, that their Great Father was justified in deserting them. . . .

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[400] James A. Clifton, "'Visiting Indians' in Canada," manuscript for Parks Canada booklet, 1979 (ICC Exhibit 11, p. 13).

> . . . I am of opinion that to the visiting Indians of the United States we cannot without a breach of faith, directly refuse to continue the presents, which by the word of our generals we have promised, and which by long custom we have sanctioned.[401]

It can be seen that, in this historical context, the purpose of the councils of 1836 and 1837 was not for Britain to *promise* presents to its Indian allies, but to *withdraw* presents, at least to those of its allies who remained in the United States. In the Commission's view, the primary consideration in this case was flowing *from* the Indians *to* the Crown, and not, as Canada contends, the other way around. There were other considerations flowing from Britain to the Indians, and we will consider those later in this report. For the time being, it is sufficient to conclude that the councils of 1836 and 1837 imposed mutually binding obligations on both the Crown and the Indians.

We will now consider the intention of the parties to create obligations – the final test established by Lamer J in *Sioui*.

Intention

Before considering the parties' positions on the intention of the Crown and the assembled Indians in 1837 to create mutually binding obligations, it is instructive to review the relevant case law bearing on this issue. In *Sioui*, after noting "the importance of the historical context, including the interpersonal relations of those involved at the time, in trying to determine whether a document falls into the category of a treaty," Lamer J continued:

> The decision of the Ontario Court of Appeal in *R. v. Taylor and Williams* (1981), 62 C.C.C. (2d) 227, also provides valuable assistance by listing a series of factors which are relevant to analysis of the historical background. In that case the Court had to interpret a treaty, and not determine the legal nature of a document, but *the factors mentioned may be just as useful in determining the existence of a treaty as in interpreting it. In particular, they assist in determining the intent of the parties to enter into a treaty*. Among these factors are:
>
> 1. continuous exercise of a right in the past and at present,
> 2. the reasons why the Crown made a commitment,
> 3. the situation prevailing at the time the document was signed,
> 4. evidence of relations of mutual respect and esteem between the negotiators, and
> 5. the subsequent conduct of the parties. . . .[402]

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[401] Sir F.B. Head to Lord Glenelg, November 20, 1836 (ICC Documents, pp. 14-15).
[402] *R. v. Sioui*, [1990] 1 SCR 1025 at 1045. Emphasis added.

Later in the same judgment, Lamer J commented on the approach to be taken by a court in determining the parties' intentions:

> Even a generous interpretation of the document . . . must be realistic and reflect the intention of both parties, not just that of the Hurons. The Court must choose from among the various possible interpretations of the common intention the one which best reconciles the Hurons' interests and those of the conqueror.[403]

In *Marshall*, the Nova Scotia Court of Appeal restated the approach this way:

> Lamer J. confirms that the goal is to deduce the common intention of the parties by interpreting the treaties in their historical context. . . .
>
> In ascertaining the common intention the court must take into consideration the context in which treaties were negotiated and committed to writing, including the limitations of the parties. The resulting interpretation must, however, be a realistic one.[404]

Canada submits that the council of 1837 did not amount to a treaty because the parties did not intend it to be one. Counsel argues that the sole purpose of Jarvis's address was to announce unilaterally Britain's policy decision to cease providing presents to native allies residing in the United States, and that this intent is evident in Head's subsequent report stating that "the Indians have been clearly and officially informed that at the Expiration of Two Years Presents will no longer be delivered to Indians residing out of the Dominions of Her Britannic Majesty."[405] Although Britain had previously required the Indians' assistance to defeat the French and to protect Upper Canada from the Americans, by 1837, according to counsel, Britain had entered a period of fiscal restraint in which, to reduce its financial commitments, it would have sought to avoid entering into treaties guaranteeing rights in perpetuity.[406] Indeed, in the same report, Head informed Lord Glenelg that, "[w]ith respect to the Reductions which have been ordered by your Lordship to be made in the Indian Department," he had terminated the services of four

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[403] *R. v. Sioui*, [1990] 1 SCR 1025 at 1069.

[404] *R. v. Marshall* (1997), 146 DLR (4th) 257 at 265-66 (NSCA).

[405] ICC Transcript, April 8, 1998, p. 122 (Perry Robinson); Reply Submission on Behalf of the Government of Canada, April 1, 1998, p. 13; Sir F.B. Head to Lord Glenelg, August 22, 1837, No. 41 in *British Parliamentary Papers*, vol. 12, "Correspondence, Returns and Other Papers Relating to Canada and the Indian Problem Therein, 1839" (Shannon: Irish University Press, undated) (ICC Exhibit 21, p. 154).

[406] ICC Transcript, April 8, 1998, pp. 141-43 (Perry Robinson).

Crown employees.[407] In Canada's submission, the fact that the Crown sought to reduce or eliminate presents was a measure of the diminished esteem and respect with which Britain regarded its Indian allies by 1837.[408]

Other indications that the Crown did not intend to enter into treaty, counsel argues, were the lack of a treaty document[409] and the seeming lack of concern on the part of Britain's representatives to ensure that Chiefs and others with representative capacity were there to act on the Indians' behalf.[410] In Canada's view, the 1837 council paralleled the conferences in ***Mitchell v. Minister of National Revenue*** which, despite certain protocols being observed, were not, according to McKeown J, treaty-making councils, in part because the parties did not intend them to be.[411] Counsel submits that, if the Crown had intended to enter into a treaty, it would have been more specific in dealing with issues such as the timing for providing reserve land, as well as reserve size and location.[412]

Counsel further points to the statements by Indian Superintendent T.G. Anderson, upon announcing the schedule for terminating all presents commencing in 1852, as evidence that presents had simply been temporary in nature and were not intended to be permanent.[413] In Canada's view, the promises of 1837 "were merely one aspect of the historic relationship between the Crown and aboriginal people," which *at most* gave rise to "an enforceable agreement or contract," but not a treaty.[414] The significance of the characterization of the 1837 council as an agreement, argues counsel, is that an agreement is not protected under subsection 35(1) of the *Constitution Act, 1982*, and can be terminated on reasonable notice, as Anderson did in 1852. However, it is important to be clear that, in Canada's view, the 1837 council was insufficient to constitute either a treaty or an agreement.[415]

Not surprisingly, the First Nation emphatically opposes this conclusion. In its view, although obligations need not be perpetual for a valid treaty to be created,[416] the 1837 address was intended by both parties to set forth the basis for a long-term relationship.[417] The address represented "an open invitation to the U.S. native allies to settle permanently within British dominions,"[418] and the clear, consistent promises of Sir William Johnson in 1763, Sir John Johnson in 1786, Robert Dickson in 1813, and S.P. Jarvis in 1837 leave no doubt, according to the First Nation, that "the Crown formally promised the allies perpetual assistance."[419] It was in reliance on these promises that "[m]any thousands of the Crown's allies migrated [and] settled in Her Majesty's dominions," preferring the "known certainty" of presents from the Crown to land-surrender payments in the United States.[420] The First Nation submits that this reliance was later demonstrated by Ogemawahj's objection in 1852 to the termination of presents, "our Great Father . . . [having] said he would continue to give us Presents as long as the sun should appear in the sky."[421]

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[407] Sir F.B. Head to Lord Glenelg, August 22, 1837, No. 41 in *British Parliamentary Papers* , vol. 12,"Correspondence, Returns and Other Papers Relating to Canada and the Indian Problem Therein, 1839" (Shannon: Irish University Press, undated) (ICC Exhibit 21, p. 154).

[408] ICC Transcript, April 8, 1998, pp. 144, 146-47 (Perry Robinson).

[409] Written Submission on Behalf of the Government of Canada, August 7, 1997, p. 44.

[410] ICC Transcript, April 8, 1998, p. 129 (Perry Robinson).

[411] Written Submission on Behalf of the Government of Canada, August 7, 1997, p. 47.

[412] ICC Transcript, April 8, 1998, p. 174 (Perry Robinson).

[413] ICC Transcript, April 8, 1998, p. 159 (Perry Robinson).

[414] Written Submission on Behalf of the Government of Canada, August 7, 1997, p. 43.

[415] ICC Transcript, April 8, 1998, pp. 120, 174-75 (Perry Robinson).

[416] Reply Submission on Behalf of the Moose Deer Point First Nation, April 3, 1998, p. 17.

Relying on Clifton's analysis, Canada suggests that the First Nation is inaccurate in its argument that the Indians migrated in reliance on the promises of 1837 alone:

> A variety of factors entered into the choice of Canada as a preferred destination when it came time for the Potawatomi to move from their homeland: the old alliance with Britain, the anticipation of receiving a continuing supply of needed goods, antipathy to the United States, the welcome offered at Penetang, a preference for the Great Lakes environment, anticipation of greater respect for their culture and customs, the possibility of being awarded new lands, and others still unknown.[422]

Canada also suggests that the Pottawatomi had a natural propensity for, and were well adapted to, migration, and that "the main reason the Pottawatomi migrated to Upper Canada was because of the American government's implementation of its policy to forcibly move the Indians west."[423]

In response to these arguments, the First Nation submits that it is no answer to say that the promises of 1837 were only one of many factors giving rise to the migration of the Crown's native allies. Rather, all the factors listed by Canada were known at the time and formed the context within which the promises were made, and those who fulfilled the condition of those promises by settling permanently in Canada "are entitled to expect the Crown to fulfill its promises."[424]

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[417] Written Submission on Behalf of the Moose Deer Point First Nation, August 1, 1997, p. 67.

[418] Written Submission on Behalf of the Moose Deer Point First Nation, August 1, 1997, p. 67.

[419] Reply Submission on Behalf of the Moose Deer Point First Nation, April 3, 1998, pp. 17-21.

[420] Written Submission on Behalf of the Moose Deer Point First Nation, April 1, 1997, p. 69; ICC Transcript, April 8, 1998, pp. 56-57 and 88 (Gary Nelson).

[421] "Address of T.G. Anderson, Superintendent of Indian affairs to the Chippewa, Potawatimie and Mohawk Indians under his Superintendence on the occasion of his making the last issue of Presents to be made to the settled Indians in Upper Canada," September 27, 1852, NA, RG 10, vol. 268 (ICC Exhibit 22, p. 163980).

[422] Clifton, *A Place of Refuge* (ICC Exhibit 13, p. 100); Written Submission on Behalf of the Government of Canada, August 7, 1997, pp. 52-53.

[423] Written Submission on Behalf of the Government of Canada, August 7, 1997, p. 53.

As to Canada's submission that the Crown's respect and esteem for the Indians had waned by 1837, the First Nation argues that the evidence suggests the contrary: the entire reason for Jarvis's address was to honour the Crown's obligations to its allies.[425] In support of this conclusion, counsel points to Head's statement in 1836 that "to the visiting Indians of the United States we cannot without a breach of faith, directly refuse to continue the presents, which by the word of our generals we have promised, and which by long custom we have sanctioned."[426] In contrast, Anderson's reference in 1852 to presents as a form of charity did not accurately characterize the promises made in 1837, but instead merely illustrated the Crown's breach of those promises.[427]

In response to Canada's suggestion that the promises constituted a contract rather than a treaty, and were thus terminable on reasonable notice, the First Nation argues that "contracts are terminable by agreement, and anything else is breach";[428] alternatively, if the promises gave rise to a treaty, "the treaty rights of the U.S. native allies cannot be extinguished without the consent of the Indians concerned."[429] In making the latter statement, the First Nation relies on the following excerpt from *Sioui*:

> It would be contrary to the general principles of law for an agreement concluded between the English and the French to extinguish a treaty concluded between the English and the Hurons. It must be remembered that a treaty is a solemn agreement between the Crown and the Indians, an agreement the nature of which is sacred: *Simon*, *supra*, at p. 410, and *White and Bob*, *supra*, at p. 649. The very definition of a treaty thus makes it impossible to avoid the conclusion that a treaty cannot be extinguished without the consent of the Indians concerned. Since the Hurons had the capacity to enter into a treaty with the British, therefore, they must be the only ones who could give the necessary consent to its extinguishment.[430]

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[424] Reply Submission on Behalf of the Moose Deer Point First Nation, April 3, 1998, p. 22.

[425] ICC Transcript, April 8, 1998, p. 190 (Gary Nelson).

[426] Sir F.B. Head to Lord Glenelg, November 20, 1836 (ICC Documents, pp. 14-15); ICC Transcript, April 8, 1998, p. 190 (Gary Nelson).

[427] ICC Transcript, April 8, 1998, p. 197 (Gary Nelson).

[428] ICC Transcript, April 8, 1998, p. 184 (Gary Nelson).

[429] Written Submission on Behalf of the Moose Deer Point First Nation, August 1, 1997, p. 84.

[430] *R. v. Sioui*, [1990] 1 SCR 1025 at 1063.

Ultimately, in the First Nation's submission, there is no significance to characterizing the 1837 promises as a contract rather than a treaty because the Specific Claims Policy, as set forth in ***Outstanding Business***, states that Canada will recognize any claim disclosing a lawful obligation arising from "non-fulfillment of a treaty or agreement between Indians and the Crown."[431]

Finally, the First Nation contends that Canada's reliance on ***Mitchell v. Minister of National Revenue*** is misplaced. The five meetings or councils between Britain and the Indians in that case can be distinguished from the 1837 council since they were simply convened "to explain the contents of the Jay Treaty and the Treaty of Ghent to the First Nations";[432] in other words, "meetings to discuss treaties do not create a treaty."[433] The implication is that the conferences in ***Mitchell*** were not intended to give rise to treaties, whereas the 1837 council in this case featured the required intention to create mutually binding obligations.

The Commission agrees with Moose Deer Point that the ***Mitchell*** case is distinguishable. The present case involves neither an international treaty nor a council to explain a treaty among European nations, negotiated in the absence of First Nation representatives. Instead, it was a council at which the Crown's representative met with a large assembly of representatives from a variety of First Nations, including the Pottawatomi, to make a formal declaration upon which both the British and the Indians intended to rely.

Having regard for the five factors set forth in ***Taylor and Williams*** and adopted by Lamer J in ***Sioui*** for determining whether a treaty exists, we conclude that the parties intended to enter solemn engagements creating binding obligations. We have already seen that, by 1837, Britain was interested in reducing its expenditures on presents. It was thus prepared to make certain promises to its native allies in the United States in the expectation that, although initially a large number of Indians might migrate to Canada to receive the benefit of these promises, few would remain permanently, meaning that the Crown's overall financial commitment would likely be reduced. We will turn to the substance of those promises in the following section of this report, but it is safe to say at this point that at least one aspect of those promises – the future residence in Canada of those Indians entitled to continue receiving presents – was intended to be settled permanently. The Indians understood that the Crown intended to be bound by its promises, and, in large part in reliance on those promises, many did migrate to Canada – and, to Britain's surprise, large numbers of them stayed. When Jarvis delivered his address on August 4, 1837, 432 Pottawatomi from "Millwackie" were situated at Manitowaning, where some were already clearing land for spring crops, and a further 218 had settled at Saugeen.[434] Within months, there were at least 1000 Pottawatomi in Upper Canada and, by mid-century, despite reports by Indian Affairs that the Pottawatomi numbered only a few hundred, there were actually several thousand.[435] It seems apparent that the Crown's decision to stop distributing presents to Indian allies who remained in the United States, and its promise of protection at a time when the Americans were forcibly moving Indians west of the Mississippi River, resulted in several thousand Pottawatomi relocating to Upper Canada within a relatively short period of time.

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[431] Reply Submission on Behalf of the Moose Deer Point First Nation, April 3, 1998, p. 1; ICC Transcript, April 8, 1998, pp. 8-9; DIAND, *Outstanding Business*, 20.

[432] *Mitchell v. Minister of National Revenue*, [1997] 4 CNLR 103 at 184.

[433] ICC Transcript, April 8, 1998, p. 186 (Gary Nelson).

Finally, as counsel for the First Nation contends, there is evidence of mutual respect and esteem between the Crown and the Indians in the dealings of 1837. Just one year earlier, Head recognized that the failure to continue to deliver presents would be viewed as a breach of faith and a blow to the honour of the Crown in its dealings with the allies who had served it so well, while the Indians considered the promises to be "the word of the white man" and thus a solemn engagement. In this context, the Indians' understanding of the transaction must be carefully considered. As Cory J stated in *Badger*:

> [I]t is well settled that the words in the treaty must not be interpreted in their strict technical sense nor subjected to rigid modern rules of construction. Rather, they must be interpreted in the sense that they would naturally have been understood by the Indians at the time of the signing. This applies, as well, to those words in a treaty which impose a limitation on the right which has been granted.[436]

Cory J further underscored the importance of construing the transaction in a way that does not undermine the promises made by the Crown to the Indians:

> [T]he honour of the Crown is always at stake in its dealings with Indian people. Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of

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[434] Clifton, *A Place of Refuge* (ICC Exhibit 13, p. 68).
[435] Clifton, *A Place of Refuge* (ICC Exhibit 13, p. 68).
[436] *R. v. Badger*, [1996] 1 SCR 771 at 799, Cory J.

> the Crown. It is always assumed that the Crown intends to fulfil its promises. No appearance of "sharp dealing" will be sanctioned.[437]

The Commission has already concluded that it is not necessary to find that the Crown and the Indians in a given case intended to enter into a ***treaty***, but merely that they intended to enter solemn engagements creating binding obligations. In our opinion, in this case they did just that. We disagree with Canada's submission that the address by Jarvis amounted to a mere announcement of British policy that the Crown was free to change or abolish. Given the formality of the 1837 council, the ceremonial delivery of a silk British flag to the Indians, the presence of high-ranking officials of the Crown, the large assembly of Indians and principal Chiefs, and the reference to a "formal" announcement, the evidence supports the conclusion that the Indians would have viewed the council as giving rise to binding treaty obligations between themselves and Britain.

What now remains to be determined is the substance of those obligations, and whether the Crown fulfilled them. It is to those questions that we now turn.

The Substance of the Promises

In considering the substance of the promises made by Britain to the Indians in 1837, it is once again important to start by reviewing the relevant legal principles established by the courts to guide us in this process.

Principles of Treaty Interpretation

One of the earlier statements of principle regarding the interpretation of Indian treaties is found in ***R. v. Taylor and Williams***, in which MacKinnon ACJO stated:

> Cases on Indian or aboriginal rights can never be determined in a vacuum. It is of importance to consider the history and oral traditions of the tribes concerned, and the surrounding circumstances at the time of the treaty, relied on by both parties, in determining the treaty's effect. Although it is not possible to remedy all of what we now perceive as past wrongs in view of the passage of time, nevertheless it is essential and in keeping with established and accepted principles that the Courts not create, by a remote, isolated current view of events, new grievances.[438]

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[437] *R. v. Badger*, [1996] 1 SCR 771 at 794, Cory J.

[438] *R. v. Taylor and Williams* (1981), 62 CCC (2d) 227 (Ont. CA) at 232-33.

The Supreme Court of Canada in *Badger* also addressed the unique considerations that must be brought to bear in assessing treaty relationships between the Crown and aboriginal peoples. We have already alluded to these in part in discussing the principles for determining whether a treaty *exists*, and, as we have seen, these principles can apply equally to assist in determining the *meaning* of a treaty. Cory J stated:

> First, it must be remembered that a treaty represents an exchange of solemn promises between the Crown and the various Indian nations. It is an agreement whose nature is sacred. See *R. v. Sioui*, [1990] 1 S.C.R. 1025, at p. 1063; *Simon v. The Queen*, [1985] 2 S.C.R. 387, at p. 401. Second, the honour of the Crown is always at stake in its dealings with Indian people. Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown. It is always assumed that the Crown intends to fulfil its promises. No appearance of "sharp dealing" will be sanctioned. See *Sparrow*, *supra*, at pp. 1107-8 and 1114; *R. v. Taylor* (1981), 34 O.R. (2d) 360 (Ont. C.A.), at p. 367. Third, any ambiguities or doubtful expressions in the wording of the treaty or document must be resolved in favour of the Indians. A corollary to this principle is that any limitations which restrict the rights of Indians under treaties must be narrowly construed. See *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 36; *Simon*, *supra*, at p. 402; *Sioui*, *supra*, at p. 1035; and *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, at pp. 142-43. Fourth, the onus of proving that a treaty or aboriginal right has been extinguished lies upon the Crown. There must be "strict proof of the fact of extinguishment" and evidence of a clear and plain intention on the part of the government to extinguish treaty rights. See *Simon*, *supra*, at p. 406; *Sioui*, *supra*, at p. 1061; *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313, at p. 404.[439]

Later in the same judgment, in applying the foregoing principles, Cory J added:

> [W]hen considering a treaty, a court must take into account the context in which the treaties were negotiated, concluded and committed to writing. . . . The treaties were drafted in English and by representatives of the Canadian government who, it should be assumed, were familiar with common law doctrines. Yet, the treaties were not translated in written form into the languages (here Cree and Dene) of the various Indian nations who were signatories. Even if they had been, it is unlikely that the Indians, who had a history of communicating only orally, would have understood them any differently. As a result, it is well settled that the words in the treaty must not be interpreted in their strict technical sense nor subjected to rigid modern rules of construction. Rather, they must be interpreted in the sense that they would naturally

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[439] *R. v. Badger*, [1996] 1 SCR 771 at 793-94, Cory J.

> have been understood by the Indians at the time of the signing. This applies, as well, to those words in a treaty which impose a limitation on the right which has been granted. See *Nowegijick, supra*, at p. 36; *Sioui, supra*, acting pp. 1035-36 and 1044; *Sparrow, supra*, acting p. 1107; and *Mitchell, supra*, where La Forest J. noted the significant difference that exists between the interpretation of treaties and statutes which pertain to Indians.[440]

In *Sioui*, Lamer J set forth the basis for these conclusions, which, in his view, are rooted in the historical relationship of the Crown and the Indians:

> Finally, once a valid treaty is found to exist, that treaty must in turn be given a just, broad and liberal construction. This principle, for which there is ample precedent, was recently reaffirmed in *Simon*. The factors underlying this rule were eloquently stated in *Jones v. Meehan*, 175 U.S. 1 (1899), a judgment of the United States Supreme Court, and are I think just as relevant to questions involving the existence of a treaty and the capacity of the parties as they are to the interpretation of a treaty (at pp. 10-11):
>
> > In construing any treaty between the United States and an Indian tribe, it must always . . . be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.[441]

In *R. v. Van der Peet*, Lamer CJC was more explicit in attributing the generous interpretation of Indian treaties to the existence of the fiduciary relationship between the Crown and the Indians:

> *General Principles Applicable to Legal Disputes Between Aboriginal Peoples and the Crown*
>
> Before turning to a purposive analysis of s. 35(1), however, it should be noted that such analysis must take place in light of the general principles which apply to the

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[440] *R. v. Badger*, [1996] 1 SCR 771 at 798-99, Cory J.

[441] *R. v. Sioui*, [1990] 1 SCR 1025 at 1035-36, Lamer J.

> legal relationship between the Crown and aboriginal peoples. In *Sparrow*, *supra*, this Court held at p. 1106 that s. 35(1) should be given a generous and liberal interpretation in favor of aboriginal peoples:
>
> > When the purposes of the affirmation of aboriginal rights are considered, *it is clear that generous, liberal interpretation of the words in the constitutional provision is commanded*. [Emphasis added.]
>
> This interpretive principle, articulated first in the context of treaty rights – *Simon v. The Queen*, [1985] 2 S.C.R. 387 at p. 402, 23 C.C.C. (3d) 238, 24 D.L.R. (4th) 390 (S.C.C.); *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29 at p. 36, 144 D.L.R. (3d) 193 (S.C.C.); *R. v. Horseman*, [1990] 1 S.C.R. 901 at p. 907, 55 C.C.C. (3d) 353 (S.C.C.); *R. v. Sioui*, [1990] 1 S.C.R. 1025 at p. 1066, 56 C.C.C. (3d) 225, 70 D.L.R. (4th) 427 (S.C.C.) – arises from the nature of the relationship between the Crown and aboriginal peoples. The Crown has a fiduciary obligation to aboriginal peoples with the result that in dealings between the government and aboriginals the honour of the Crown is at stake. Because of this fiduciary relationship, and its implication of the honour of the Crown, treaties, s. 35(1), and other statutory and constitutional provisions protecting the interests of aboriginal peoples, must be given a generous and liberal interpretation: *R. v. George*, [1966] S.C.R. 267 at p. 279, [1966] 3 C.C.C. 137, 55 D.L.R. (2d) 386 (S.C.C.).[442]

We have already reviewed the five factors listed by Lamer CJ in *Sioui* for determining the legal nature of a document or other instrument recording or defining a relationship between the Crown and the Indians:

1. continuous exercise of a right in the past and at present,
2. the reasons why the Crown made a commitment,
3. the situation prevailing at the time the document was signed,
4. evidence of relations of mutual respect and esteem between the negotiators, and
5. the subsequent conduct of the parties.

It will be recalled that Lamer CJ concluded that these historical factors are equally applicable for interpreting a treaty document or instrument as for determining its legal nature. However, it is also important to recall the Chief Justice's ruling that "extrinsic evidence is not to be used as an aid to interpreting to treaty in the absence of ambiguity or where the result would be to alter its terms by adding words to or subtracting words from the written agreement."[443] Although a "more flexible approach" may be used in determining whether a treaty *exists*, that enhanced flexibility is *not* available, absent ambiguity, when the task is to *interpret* the treaty.[444]

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[442] *R. v. Van der Peet* (1996), 137 DLR (4th) 289 at 301-02 (SCC), Lamer CJ.
[443] *R. v. Sioui*, [1990] 1 SCR 1025 at 1049, Lamer J.
[444] *R. v. Marshall* (1997), 146 DLR (4th) 257 at 266 (NSCA).

With these principles firmly in mind, we can now address the promises claimed by the First Nation to have been made by Britain to the Indians at the 1837 council: the continuation of presents, the provision of land on which to exercise ancient customs and earn a traditional livelihood, the protection of the Indians against encroachment by white settlers and development, and the assurance that the native allies would be treated in the same manner as other Indians in Canada. For ease of reference, these promises will be referred to simply as presents, land, protection, and equality. We will deal first with presents.

Presents

It is useful to begin by reviewing the relevant portions of Jarvis's address before considering the parties' submissions on the content of the Crown's promise of presents during the 1837 council:

> Children, – Your Great Father the King has determined that Presents shall be continued to be given to all Indians resident in the Canadas; but Presents will be given to Indians residing in the United States only for Three Years, including the present Delivery.

After explaining the reasons for discontinuing presents to Indians residing in the United States, Jarvis continued:

> But, Children, let it be distinctly understood, that the British Government has not come to a Determination to cease to give Presents to the Indians of the United States. On the contrary, the Government of your Great Father will be most happy to do so, provided they live in the British Empire.
>
> Therefore, although your Great Father is willing that his Red Children should all become permanent Settlers in this Island, it matters not in what Part of the British Empire they reside. They may go across the Great Salt Lake to the Country of their Great Father the King, and there reside and there receive their Presents, or they may remove into any part of the Provinces of Upper and Lower Canada, New Brunswick, Nova Scotia, or any other British Colony, and yet receive them; but they cannot and must not expect to receive them after the End of Three Years if they continue to reside within the Limits of the United States. . . .
>
> *Children! – You must therefore come and live under the protection of your Great Father, or lose the advantage which you have so long enjoyed, of annually receiving valuable presents from him. . . .*
>
> Your Great Father who lives across the Great Salt Lake is your Guardian and Protector, and he only. He has relinquished his Claim to this large and beautiful Island on which we are assembled, in order that you may have a Home of your own quite

> separate from his White Children. The Soil is good, and the Waters which surround the Shores of this Island are abundantly supplied with the finest of Fish.
>
> If you cultivate the Soil with only moderate Industry, and exert yourselves to obtain Fish, you can never want, and your Great Father will continue to bestow annually on all those who permanently reside here or in any Part of his Dominions valuable Presents, and will from Time to Time visit you at this Place to behold your Improvements.[445]

Moose Deer Point submits that the intent of these excerpts is clear: an "unlimited" promise to continue to provide presents annually to those native allies who relocated from the United States and settled permanently in Canada.[446] According to counsel, the words of the promises belie Canada's suggestion that the promises were simply intended to implement a policy rather than to create a lasting obligation.[447] Rather, the promises were merely the last in a series of such promises commencing in 1763 in which the Crown formally promised presents in perpetuity.[448]

For its part, Canada urges the Commission to exercise caution in distinguishing between annuities for ceded lands, which might be payable in perpetuity depending on the circumstances of the particular treaty, and presents, which, being based on British policy of the day, were temporary in nature and not intended to last forever.[449] Moreover, since the presents were mere policy, the British government was free to change or abolish them as it saw fit, being under no legal obligation to continue them.[450]

As to the substance of Jarvis's address, Canada contends that the proposed new policy included the following elements:

> a) a reserve would be established on Manitoulin Island, for all the Indians of Upper Canada;

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[445] "Address of the Chief Superintendent of Indian Affairs to the Indians assembled in General Council at the Great Manitoulin Island," August 4, 1887, enclosed in Sir F.B. Head to Lord Glenelg, August 22, 1837, No. 41 in *British Parliamentary Papers*, Vol. 12, "Correspondence, Returns and Other Papers Relating to Canada and the Indian Problem Therein, 1839" (Shannon: Irish University Press, undated) (ICC Exhibit 21, pp. 155-56); see also Jameson, *Winter Studies and Summer Rambles* (ICC Exhibit 20, pp. 502-05); NA, RG 10, Records of Chief Superintendent's Office, Upper Canada, 1831-1847, vol. 66, pp. 63741-50, 63751-57; Memorandum on "Indian Presents," September 23, 1943, DIAND, Claims and Historical Research Centre, Item I-116 (ICC Documents, pp. 348-49). Emphasis added. As noted previously, the italicized paragraph was omitted from the second manuscript version (pp. 63751-57) and the version in the *British Parliamentary Papers*, but was included in the Jameson version (reproduced here) and the first manuscript version (pp. 63741-50).

[446] Written Submission on Behalf of the Moose Deer Point First Nation, August 1, 1997, p. 77; ICC Transcript, April 8, 1998, p. 98 (Gary Nelson).

[447] Reply Submission on Behalf of the Moose Deer Point First Nation, April 3, 1998, p. 21.

[448] ICC Transcript, April 8, 1998, pp. 191-93 (Gary Nelson).

[449] ICC Transcript, April 8, 1998, p. 158 (Perry Robinson); Reply Submission on Behalf of the Government of Canada, April 1, 1998, p. 27.

[450] Written Submission on Behalf of the Government of Canada, August 7, 1997, p. 50.

b) presents would continue to be distributed to the Indians residing in Upper Canada;

c) Indians residing in the United States would be invited to move to Upper Canada, where they would continue to receive presents;

d) Indians who moved to Upper Canada would be encouraged to reside on Manitoulin Island;

e) the distribution of presents to Indians who remained in the United States would be discontinued after 3 years; and

f) the cost of presents, and of the administration of the Indian Department, would be covered by the sale of the surrendered lands in Upper Canada.[451]

The substance of the promises, according to Canada, is that "as Indian allies they were welcome to move to Upper Canada; if they did so, they would continue to receive presents and would be treated in the same way as other Indians in the Province."[452]

Canada submits that, in the absence of an express statement that presents were to be eternal, and having regard to the principles of treaty interpretation, the task of the Commission is to choose a time frame that is realistic and reflects the intention of both parties.[453] A perpetual guarantee of presents is not supported by the historical context; according to Canada, Britain's policy of providing presents was expedient and transient, waxing and waning depending on the Crown's need for Indian allies from time to time, and by 1837 that need had virtually ceased.[454] Moreover, counsel argues that Anderson's speech announcing the complete termination of presents commencing in 1852 demonstrates that presents were merely intended to help the Indians establish themselves, and that presents ceased to be necessary or "just" once the Indians had obtained land and were receiving annuities.[455] Therefore, it should be inferred that the delivery of presents was intended to be terminable on reasonable notice since, in counsel's submission, it would be unreasonable for a court to read the word "perpetual" into a contract where the parties have not specifically provided for it.[456]

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[451] Written Submission on Behalf of the Government of Canada, August 7, 1997, pp. 5, 28.

[452] Written Submission on Behalf of the Government of Canada, August 7, 1997, p. 33.

[453] Reply Submission on Behalf of the Government of Canada, April 1, 1998, p. 22; ICC Transcript, April 8, 1998, pp. 154-55 (Perry Robinson).

[454] Reply Submission on Behalf of the Government of Canada, April 1, 1998, pp. 23-26.

[455] Written Submission on Behalf of the Government of Canada, August 7, 1997, p. 49.

[456] ICC Transcript, April 8, 1998, pp. 153-54 (Perry Robinson); Reply Submission on Behalf of the Government of Canada, April 1, 1998, pp. 19-21.

Although Jarvis specifically established a termination date following which presents would no longer be paid to Indian allies residing in the United States, Canada submits that he did *not* state or imply that the Indians who moved to Canada would receive presents forever. When the Crown intends to grant a right in perpetuity, it normally does so expressly, but in this case Jarvis merely stated that presents would *continue* on an *annual* basis. Accordingly, argues Canada, the failure to include specific wording should be interpreted as meaning a lack of intention to provide presents perpetually; "'annually' means payment every year, but it doesn't mean forever."[457] The inconsistent responses of the various Indian Chiefs to Anderson's speech in 1852 demonstrate that at least some of the Indians understood that presents would not be permanent.[458]

In response to Canada's submissions, Moose Deer Point argues that to suggest presents were given to the Indians when they were poor and could not support themselves is "patently untrue." Rather than being a form of charity, the presents represented consideration for the Indians' trade and military alliance with Britain, and "Anderson's statement was an expedient pretext for an unconscionable breach of promise."[459] Moreover, there is nothing in Jarvis's address to suggest that the cost of presents or the administration of the Indian Department would be covered by the sale of surrendered lands, since surrender was not mentioned at all.[460] Finally, the First Nation submits that it is no answer that some of the Indians may have understood statements by the Crown's officers in different ways because "[t]hese statements and promises could not be clearer": perpetual presents or financial assistance as a matter of treaty entitlement to those Indian allies who moved to Canada.[461]

In the Commission's view, the question of presents in this case is anything but clear. By its very nature, the term "present" suggests a gift or gratuity, and *Black's Law Dictionary* defines "gift" as "[a] voluntary transfer of property to another made gratuitously and without consideration."[462] Similarly, *The Canadian Law Dictionary* defines "gift" as "[a] voluntary transfer of any thing made without consideration or expectation of consideration."[463] In other words, if the Commission were to accept these definitions as applicable to the presents in this case, we would have to assume that the presents were given without consideration and, as such, could presumably be unilaterally terminated at any time by the Crown. This approach is very much in keeping with Canada's view of presents as simply a matter of British policy to be varied in accordance with the circumstances of the day, but it is clearly inconsistent with the Indian perspective. As James Clifton has written:

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[457] ICC Transcript, April 8, 1998, pp. 149-53 (Perry Robinson).

[458] Written Submission on Behalf of the Government of Canada, August 7, 1997, pp. 49-50; ICC Transcript, April 8, 1998, p. 159 (Perry Robinson).

[459] Reply Submission on Behalf of the Moose Deer Point First Nation, April 3, 1998, p. 4.

[460] Reply Submission on Behalf of the Moose Deer Point First Nation, April 3, 1998, p. 4.

[461] Reply Submission on Behalf of the Moose Deer Point First Nation, April 3, 1998, p. 21.

[462] *Black's Law Dictionary* , 5th ed. (St Paul, Minnesota: West Publishing Co., 1979), 619.

[463] *The Canadian Law Dictionary* (Toronto: Law and Business Publications (Canada) Inc., 1980), 163.

> Much of what contemporary officials defined as abuses and misuses of the system, we can see in retrospect, represented quite different cultural definitions placed on the same custom. Most Visiting Indians had quickly come to view presents as their legitimate due, as debts contracted for first by the French and then inherited and enlarged by the British, debts for lands surrendered or for services performed in earlier years, debts that were subject to perpetual repayment across the generations.
>
> British authorities, on the other hand, with their "straight Rail Road habits of the Chartered Accountant," as Sir Francis Bond Head put it, placed a much narrower and more limited cast on the practice. War service pensions were one category of payments due only to specified veterans and their widows, while payments for lands ceded were due only for the term of years and to the parties identified in particular treaties, while both these categories were to be accounted for in different columns and books than those used to record the distribution of presents. Presents were purely a matter of royal beneficence, these officials were convinced, a matter of charity, equity, and generosity, not a legal obligation.[464]

In our view, presents were more than mere gifts or charity. We have already concluded that the address of 1837 amounted to a treaty and not simply an announcement of Crown policy. We also find that, contrary to the dictionary definitions of "gift," not only was consideration *given* by the Indians in this case in the form of military assistance and trade, but it was *expected*. We cannot imagine that Britain would have been prepared to provide presents to the Indians without an understanding and expectation of some form of *quid pro quo*.

That being said, we see nothing in the record of Jarvis's address indicating the duration of payment of annual presents, other than that presents would be discontinued for Indians who remained in the United States. There are explicit statements that "Presents shall be *continued* to be given to all Indians resident in the Canadas," and that the "Great Father will *continue* to bestow annually on all those who permanently reside here or in any Part of his Dominions valuable Presents." However, it is a stretch for us to conclude that a promise to continue the annual payment of presents constitutes an express promise in perpetuity. There is some merit in Canada's argument that, where the Crown has intended to promise something in perpetuity, it has said so expressly.

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[464] James A. Clifton, "'Visiting Indians' in Canada," manuscript for Parks Canada booklet, 1979 (ICC Exhibit 11, p. 29).

Has a promise of perpetual presents been made implicitly? We are not certain, and, given subsequent events, we do not believe that it is necessary for us to decide the question. It will be recalled that, in 1852, Indian Superintendent Anderson met with the Indians at Penetanguishene to inform them that presents to Indians resident in Canada would be gradually phased out over the next few years. Anderson justified the decision on the basis that presents were charity that had been given to the Indians when they were poor and could not support themselves; however, presents were no longer required "now that many of you have become farmers, have annuities, plenty of land, pay no taxes and are well able to work."[465]

We disagree with this characterization of presents by Anderson and later by Canada in its submissions to this inquiry. In particular, we cannot agree that terminating presents to the Moose Deer Point First Nation's ancestors could be justified on the basis of annuities and land, since they received neither. We also disagree with Canada's portrayal of the 1837 promises as a mere agreement which, in the absence of an express term regarding the duration of presents, the Crown could terminate upon reasonable notice. That being said, however, we must consider the termination of presents in the context of parliamentary supremacy and the power of the Crown to terminate treaty obligations unilaterally in the years before the protection of aboriginal and treaty rights in subsection 35(1) of the *Constitution Act, 1982*.

The Supreme Court of Canada has issued apparently conflicting rulings on what is required to terminate a treaty. In *R.* v. *Horseman,*[466] commercial hunting rights protected by Treaty 8 were found to have been extinguished unilaterally by the *Natural Resources Transfer Agreement*, entered into by the federal government and the Province of Alberta in 1930. The facts of the case were straightforward. While hunting, the accused, a member of the Horse Lake Indian Band, was attacked by a grizzly bear, which he killed in self-defence. Later, finding himself in difficult financial circumstances, he sold the bear's hide and was convicted of trafficking in wildlife contrary to section 42 of the province's *Wildlife Act*. On appeal to the Supreme Court of Canada, the accused contested certain judicial decisions which held that the right of Indians to hunt for sport or commercially could be regulated by provincial game laws, but the right to hunt for food could not:

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[465] "Address of T.G. Anderson, Superintendent of Indian [A]ffairs[,] to the Chippewa, Potawatimie and Mohawk Indians under his Superintendence on the occasion of his making the last issue of Presents to be made to the settled Indians in Upper Canada," September 27, 1852, NA, RG 10, vol. 268 (ICC Exhibit 22, p. 163980).

[466] *R. v. Horseman*, [1990] 3 CNLR 97 (SCC).

> Firstly, it is argued that when it is looked at in its historical context, the 1930 Transfer Agreement was meant to protect the rights of Indians and not to derogate from those rights. Secondly, and most importantly, it is contended that the traditional hunting rights granted to Indians by Treaty 8 could not be reduced or abridged in any way without some form of approval and consent given by the Indians, the parties most affected by the derogation, and without some form of compensation or quid pro quo for the reduction in the hunting rights. Thirdly, it is said that on policy grounds the Crown should not undertake to unilaterally change and derogate the treaty rights granted earlier. To permit such a course of action could only lead to the dishonour of the Crown. It is argued that there rests upon the Crown an obligation to uphold the original native interests protected by the treaty. That is to say, the Crown should be looked upon as a trustee of the native hunting rights.[467]

By a 4-3 majority, the Court concluded that the *Natural Resources Transfer Agreement* did feature a *quid pro quo* since the withdrawal of the right to hunt commercially was offset by extending the geographical areas in which Indian people could hunt for food, by eliminating seasonal limitations on the Indians' right to hunt, and by placing the Indians' means of hunting beyond the reach of provincial governments. Cory J (Lamer, La Forest, and Gonthier JJ concurring) stated:

> It can be seen that the quid pro quo was substantial. Both the area of hunting and the way in which the hunting could be conducted was extended and removed from the jurisdiction of provincial governments. . . .
>
> It is thus apparent that although the Transfer Agreement modified the treaty rights as to hunting, there was a very real quid pro quo which extended the native rights to hunt for food. In addition, although it might well be politically and morally unacceptable in today's climate to take such a step as that set out in the 1930 agreement without consultation with and concurrence of the native peoples affected, *nonetheless the power of the federal government to unilaterally make such a modification is unquestioned and has not been challenged in this case.*[468]

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[467] *R. v. Horseman*, [1990] 3 CNLR 97 at 121-22 (SCC), Cory J.

[468] *R. v. Horseman*, [1990] 3 CNLR 97 at 122-23 (SCC), Cory J. Emphasis added.

Although she disagreed with the disposition of the appeal, Wilson J (Dickson CJ and L'Heureux-Dubé J concurring) agreed with the implications of existing judicial authorities on the question of the Crown's power to amend treaty obligations unilaterally:

> In my view, the decisions in ***Smith*** and ***Wesley***, cases that were decided shortly after the Transfer Agreement came into force, as well as later decisions in cases like ***Strongquill*** and ***Frank***, make clear that, to the extent that it is possible, one should view para. 12 of the Transfer Agreement as an attempt to respect the solemn engagement embodied in Treaty 8, not as an attempt to abrogate or derogate from that treaty. While it is clear that para. 12 of the Transfer Agreement adjusted the areas within which Treaty 8 Indians would thereafter be able to engage in their traditional way of life, given the oral and archival evidence with respect to the negotiation of Treaty 8 and the pivotal nature of the guarantee concerning hunting, fishing and trapping, one should be extremely hesitant about accepting the proposition that para. 12 of the Transfer Agreement was also designed to place serious and invidious restrictions on the range of hunting, fishing and trapping related activities that Treaty 8 Indians could continue to engage in. ***In so saying I am fully aware that this court has stated on previous occasions that it is not in a position to question an unambiguous decision on the part of the federal government to modify its treaty obligations*****:** ***Sikyea v. R.***, [1964] S.C.R. 642, 49 W.W.R. 306, 44 C.R. 266, [1965] 2 C.C.C. 129, 50 D.L.R. (2d) 80 [N.W.T.]; *R. v. George*, [1966] S.C.R. 267, 47 C.R. 382, [1966] 3 C.C.C. 137, 55 D.L.R. (2d) 386 [Ont.]; and ***Moosehunter v. R.***, [1981] 1 S.C.R. 282 at 293, 59 C.C.C. (2d) 193, 123 D.L.R. (3d) 95, 9 Sask. R. 149, 36 N.R. 437. ***We must, however, be satisfied that the federal government did make an "unambiguous decision" to renege on its Treaty 8 obligations when it signed the 1930 Transfer Agreement.***[469]

From this decision, the Court appeared to say that the Crown can modify its treaty obligations by making a clear and unambiguous decision to do so.

Three weeks later, however, the Court issued its unanimous decision in *Sioui*. In that case, the Crown argued that the treaty of September 5, 1760, had been extinguished by a series of documents and events, consisting of the Act of Capitulation of Montreal signed on September 8, 1760, the Treaty of Paris signed on February 10, 1763, the *Royal Proclamation* of October 7, 1763, the legislative and administrative history of the Hurons' land, and "the effect of time and non-user of the treaty." Lamer J stated:

> Neither the documents nor the legislative and administrative history to which the appellant [Crown] referred the Court contain any express statement that the treaty of

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[469] *R. v. Horseman*, [1990] 3 CNLR 97 at 108-09 (SCC), Wilson J. Emphasis added.

> September 5, 1760 has been extinguished. Even assuming that a treaty can be extinguished implicitly, a point on which I express no opinion here, the appellant was not able in my view to meet the criterion stated in *Simon* regarding the quality of evidence that would be required in any case to support a conclusion that the treaty had been extinguished. That case clearly established that the onus is on the party arguing that the treaty has terminated to show the circumstances and events indicating it has been extinguished. This burden can only be discharged by strict proof, as the Chief Justice said at pp. 405-6:
>
>> Given the serious and far-reaching consequences of a finding that a treaty right has been extinguished, it seems appropriate to demand strict proof of the fact of extinguishment in each case where the issue arises.[470]

As to the Crown's argument that the treaty in *Sioui* had been terminated by the Act of Capitulation of Montreal and the Treaty of Paris, Lamer J held that these documents did not amount to "persuasive evidence of extinguishment of the treaty." He continued:

> It would be contrary to the general principles of law for an agreement concluded between the English and the French to extinguish a treaty concluded between the English and the Hurons. It must be remembered that a treaty is a solemn agreement between the Crown and the Indians, an agreement the nature of which is sacred: *Simon*, *supra*, at p. 410, and *White and Bob*, *supra*, at p. 649. *The very definition of a treaty thus makes it impossible to avoid the conclusion that a treaty cannot be extinguished without the consent of the Indians concerned. Since the Hurons had the capacity to enter into a treaty with the British, therefore, they must be the only ones who could give the necessary consent to its extinguishment.*[471]

In the Commission's view, although *Sioui* seems to contradict *Horseman*, the statement by Lamer J that a treaty cannot be extinguished without the consent of the Indians concerned must be considered *dicta*, given that he had already concluded that the documents and events proffered by the Crown as evidence of extinguishment fell short of proving that fact. In the context of the earlier decision in *Horseman*, we take from Justice Lamer's reasons the principle that extinguishment will not be implied as an incidental effect of an agreement between the Crown and another party if the Indians are not also party to that agreement. We see no reason why a distinction in principle should be made between, on the one hand, an agreement like the *Natural Resources Transfer Agreement*, involving the federal Crown and a provincial counterpart, as in *Horseman*, and, on the other hand, an agreement between the federal Crown and an international counterpart, as in *Sioui*. In either case, if the result of the agreement is to extinguish Indian treaty rights, that result should not obtain unless that intent is clearly and unambiguously stated; alternatively, if the intent to extinguish is *not* clear and plain, but rather is incidental or implicit, then the extinguishment should not obtain without, as Lamer J concluded, the consent of the Indians concerned as parties to the agreement.

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[470] *R. v. Sioui*, [1990] 1 SCR 1025 at 1061.
[471] *R. v. Sioui*, [1990] 1 SCR 1025 at 1063. Emphasis added.

We believe that this analysis is supported by later decisions of the Supreme Court of Canada. For example, in *Badger*, Cory J stated:

> . . . the existence of the NRTA has not deprived Treaty No. 8 of legal significance. *Treaties are sacred promises and the Crown's honour requires the Court to assume that the Crown intended to fulfil its promises. Treaty rights can only be amended where it is clear that effect was intended.* It is helpful to recall that Dickson J. in *Frank*, *supra*, observed at p. 100 that, while the NRTA had partially amended the scope of the Treaty hunting right, "of equal importance was the desire to re-state and reassure to the treaty Indians the continued enjoyment of the right to hunt and fish for food" (emphasis added). I believe that these words support my conclusion that the Treaty No. 8 right to hunt has only been altered or modified by the NRTA to the extent that the NRTA evinces a clear intention to effect such a modification. This position has been repeatedly confirmed in the decisions referred to earlier. Unless there is a direct conflict between the NRTA and a treaty, the NRTA will not have modified the treaty rights.[472]

Similarly, in a dissenting judgment in *Van der Peet*, McLachlin J derived the test for the extinguishment of aboriginal rights from American jurisprudence establishing the same test for the extinguishment of treaty rights:

> For legislation or regulation to extinguish an aboriginal right, the intention to extinguish must be "clear and plain": *Sparrow*, *supra*, at p. 1099. The Canadian test for extinguishment of aboriginal rights borrows from the American test, enunciated in *United States v. Dion*, 476 U.S. 734 (1986), at pp. 739-40: "*what is essential [to satisfy the 'clear and plain' test] is clear evidence that [the government] actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty*" or right.[473]

In the Commission's view, the cumulative effect of these decisions is that, before the implementation of the *Constitution Act, 1982*, the Crown could unilaterally extinguish treaty rights as long as it expressed a "clear and plain" intention to do so. To borrow from McLachlin J in *Van der Peet*, such a "clear and plain" intention is evident where the government actually considers the conflict between its intended action on the one hand and Indian treaty rights on the other and chooses to resolve that conflict by abrogating the treaty. Employing this test, we have no doubt that, even if it did not recognize that the council of 1837 had given rise to a treaty, the Crown in 1852 must be considered as having clearly recognized its continuing obligation to provide the Indians with presents, as well as the importance attached to that obligation by the Indians. The Crown must also be viewed as having chosen, through the clear and plain words of Anderson at Penetanguishene, to terminate that obligation:

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[472] *R. v. Badger*, [1996] 1 SCR 771 at 796-97, Cory J. Italic emphasis added.

[473] *R. v. Van der Peet* (1996), 137 DLR (4th) 289 at 385 (SCC), McLachlin J. Emphasis added.

> When I last met you in Council I told you the period was near at hand when you would get no more Presents. I did not know at that time that the day was so near, but the time has arrived and *this is the last day (year) that Your Great Mother's Blankets will be issued to you*. . . .
>
> This letter informs you that *your Great Mother's Councillors had considered the subject of the Indian Presents; that after many days (years) serious thought about the matter they have concluded that this shall be the last time this bounty shall be distributed to the settled Indians in Upper Canada*. . . .
>
> I have told you that this is the last time you will receive Blankets from the Gov[ern]m[en]t and to show you with how much care it has considered your interest I now tell you that next year, three fourths of the value of the Presents will be paid in money, that is to say, the amount will be added to your annuities respectively and apply in the same way that your annuities are. The year after only one half will be allowed you, and the following, being the last year only one fourth, and *thus will end what is called Indian Presents*. The Government, my friends, have adopted this humane mode of putting an end, by degrees, to the gratuity which you and your fathers have received for nearly a hundred years merely out of charity because you were not able to clothe yourselves.[474]

We do not see how the Crown's intention to terminate its obligation could have been stated more clearly. That being the case, we must conclude that the Moose Deer Point First Nation's treaty right to presents, whether perpetual or not, was effectively extinguished in 1852.

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[474] "Address of T.G. Anderson, Superintendent of Indian [A]ffairs[,] to the Chippewa, Potawatimie and Mohawk Indians under his Superintendence on the occasion of his making the last issue of Presents to be made to the settled Indians in Upper Canada," September 27, 1852, NA, RG 10, vol. 268, pp. 163974 and 163976 (ICC Exhibit 22). Emphasis added.

Land and Protection

The Moose Deer Point First Nation alleges that the 1837 address included promises, first, to provide the Indians with their own reserve lands as well as rights to use and occupy adjoining lands, on which to exercise their ancient customs and earn a traditional livelihood; and, second, to protect the Indians in their enjoyment of these lands against encroachment by white settlers and development. We have previously referred to these promises as the promises of land and protection. Because the facts underlying each promise are similar, the Commission proposes to deal with the parties' arguments regarding these promises jointly. Our analysis of the promises will be dealt with separately, however.

The wording of the 1837 address is again critical to a consideration of these claims. It will be recalled that, in the meeting at Manitowaning on Manitoulin Island, Jarvis stated:

> But, Children, let it be distinctly understood, that the British Government has not come to a Determination to cease to give Presents to the Indians of the United States. On the contrary, the Government of your Great Father will be most happy to do so, provided they live in the British Empire.
>
> Therefore, although your Great Father is willing that his Red Children should all become permanent Settlers in this Island, it matters not in what Part of the British Empire they reside. They may go across the Great Salt Lake to the Country of their Great Father the King, and there reside and there receive their Presents, or they may remove into any part of the Provinces of Upper and Lower Canada, New Brunswick, Nova Scotia, or any other British Colony, and yet receive them; but they cannot and must not expect to receive them after the End of Three Years if they continue to reside within the Limits of the United States. . . .
>
> Your Great Father who lives across the Great Salt Lake is your Guardian and Protector, and he only. He has relinquished his Claim to this large and beautiful Island on which we are assembled, in order that you may have a Home of your own quite separate from his White Children. The Soil is good, and the Waters which surround the Shores of this Island are abundantly supplied with the finest of Fish.
>
> If you cultivate the Soil with only moderate Industry, and exert yourselves to obtain Fish, you can never want, and your Great Father will continue to bestow annually on all those who permanently reside here or in any Part of his Dominions valuable Presents, and will from Time to Time visit you at this Place to behold your Improvements.[475]

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[475] "Address of the Chief Superintendent of Indian Affairs to the Indians assembled in General Council at the Great Manitoulin Island," August 4, 1837, enclosed in Sir F.B. Head to Lord Glenelg, August 22, 1837, No. 41 in *British Parliamentary Papers*, vol. 12, "Correspondence, Returns and Other Papers Relating to Canada and the Indian Problem Therein, 1839" (Shannon: Irish University Press, undated) (ICC Exhibit 21, pp. 155-56); see also Jameson, *Winter Studies and Summer Rambles* (ICC Exhibit 20, pp. 502-05); NA, RG 10, Records of Chief Superintendent's Office, Upper Canada, 1831-1847, vol. 66, pp. 63741-50 and 63751-57; Memorandum on "Indian Presents," September 23, 1943, DIAND, Claims and Historical Research Centre, Item I-116 (ICC Documents, pp. 348-49).

The Moose Deer Point First Nation submits that, since Britain's native allies in the United States were invited to settle permanently in Canada, land was necessarily implicit in the promise.[476] To the extent that Canada fails to recognize this inherent requirement to provide land, it fails to come to grips with the promise of refuge and the invitation to settle permanently.[477] As counsel remarked:

> You cannot settle allies who were dispossessed and who were dispersed without placing land at their disposal.
>
> It is implicit in an invitation to come to settle in Canada that land will be placed at their disposal. . . .
>
> Permanent settlement is the key here, because that is the condition that was required for those who were to come across. They had to settle permanently in Canada.[478]

According to the First Nation, the implicit need to provide land can be seen in the unsigned note, likely from Chief Superintendent James Givins to Anderson, upon the arrival of 215 Chippewa and Pottawatomi from the Milwaukee area in 1835 to request presents and permission to settle. Givins wrote that "the Indians may remain under our protection and have land offered to them."[479] Similarly, counsel points to land previously provided to Iroquois loyalists following the American War of Independence and to other refugees following the Battle of Fallen Timbers as evidence that the Crown itself had recognized on several occasions that land would have to be made available to the relocating Indians.[480]

Moreover, the First Nation contends that the Indians to whom Jarvis spoke were not limited in the place of residence they could select. Although the native allies were encouraged to settle on Manitoulin Island, Jarvis specifically indicated that they could move anywhere in the British Empire, including England itself, and continue to receive presents there.[481] In the First Nation's submission, this fact demonstrates that providing land wherever the Indians chose to settle must be implied in the 1837 address. Although it was anticipated that the Indians would take up cultivation, they were also expected to continue their traditional way of life based on hunting, fishing, and trapping.[482] The presents they had been receiving, and were promised to continue receiving, were not money, but included goods such as rifles, ball, shot, and butcher knives that were all staples of that traditional lifestyle. That being the case, argues counsel, the parties must have contemplated that the Indians would be given land for their occupation and use in carrying on their traditional economy using the presents given to them by the Crown.[483]

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[476] Written Submission on Behalf of the Moose Deer Point First Nation, August 1, 1997, p. 72.

[477] Reply Submission on Behalf of the Moose Deer Point First Nation, April 3, 1998, p. 22.

[478] ICC Transcript, April 8, 1998, pp. 27-28, 54-55 (Gary Nelson).

[479] T.G. Anderson, Indian Superintendent, Manitowaning, to Colonel James Givins, Chief Superintendent, July 16, 1835, NA, RG 10, C-11019, vol. 58, pp. 59677-79, in "Pottawatomie Correspondence Collected by Franz Koennecke" (ICC Exhibit 15, p. 1).

[480] ICC Transcript, April 8, 1998, pp. 95-96 (Gary Nelson).

[481] Written Submission on Behalf of the Moose Deer Point First Nation, August 1, 1997, pp. 67, 72; Reply Submission on Behalf of the Moose Deer Point First Nation, April 3, 1998, p. 4; ICC Transcript, April 8, 1998, p. 56.

In the First Nation's view, it would be unconscionable for Canada to suggest that "the Crown's promise of refuge meant that the native allies who had contributed so significantly to the successful defence of Canada should be offered refuge as landless mendicants, without the right to carry on their traditional life upon the land, without any other basis of supporting themselves and dependent only on grace and benevolence."[484] Rather, counsel submits that land was promised – expressly in the case of Manitoulin Island, and implicitly in the promise of refuge for permanent settlers.[485] Although the First Nation acknowledges that the Crown has no power to *grant* rights of use and occupation in lands over which other First Nations hold aboriginal title, it argues that the Crown can *recognize* aboriginal title and rights in such lands, and that it was and is common for the Crown to promote cooperative arrangements to share territory. As a result, the Crown was obliged to provide land in one or more of three ways: by purchasing it (as the Crown did for Iroquois loyalists), by setting it aside out of lands already ceded by First Nations, or by arranging for the acceptance of the immigrating Indians on lands already settled by established First Nations.[486] "In essence," says the First Nation, "under the treaty, the allies were to be provided with lands on which to settle permanently, which would permit them to adopt a more settled economy over time and they were to enjoy aboriginal rights in the vicinity of their settlements," provided that the native people holding aboriginal title to the land agreed to that right.[487] This "more settled economy" was in the common interest of both the Crown and the Indians, since it would prevent the Indians from coming into conflict with other settlers, and therefore it was appropriate for the Crown to set aside sufficient lands on which the Indians could continue their traditional economy while making the transition to a more modern economy as settlement advanced.[488]

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[482] Written Submission on Behalf of the Moose Deer Point First Nation, August 1, 1997, p. 67; ICC Transcript, April 8, 1998, p. 55 (Gary Nelson).

[483] Written Submission on Behalf of the Moose Deer Point First Nation, August 1, 1997, p. 73; ICC Transcript, April 8, 1998, pp. 96, 201-02 (Gary Nelson).

[484] Written Submission on Behalf of the Moose Deer Point First Nation, August 1, 1997, p. 88; ICC Transcript, April 8, 1998, p. 108 (Gary Nelson).

[485] Written Submission on Behalf of the Moose Deer Point First Nation, August 1, 1997, p. 87; ICC Transcript, April 8, 1998, p. 108 (Gary Nelson).

[486] Written Submission on Behalf of the Moose Deer Point First Nation, August 1, 1997, p. 88; Reply Submission on Behalf of the Moose Deer Point First Nation, April 3, 1998, pp. 7-8; ICC Transcript, April 8, 1998, p. 109 (Gary Nelson).

[487] Written Submission on Behalf of the Moose Deer Point First Nation, August 1, 1997, p. 79.

Closely connected to this claim to land is the First Nation's claim that it is and was entitled to be protected by the Crown. According to counsel, this protection was not limited to military protection from the Americans, who were driving the Indian allies from their homelands. It also included protection of the Indians' own lands, as well as protection of their use and occupation of land in the vicinity of their own lands for traditional purposes against the encroachment of white settlers. Given Jarvis's statement that the Indians should rely solely on the Crown for advice in temporal matters, and the reliance of the Indians on that advice by forsaking land payments in the United States for the "known certainty" of presents, Moose Deer Point submits that the Crown should be considered to have undertaken a fiduciary obligation to protect the First Nation's interests.[489]

Finally, the First Nation argues that other bands have already recognized Pottawatomi rights to use land, including specific hunting and fishing territories.[490] In some cases, Pottawatomi clans or clan segments were incorporated directly into existing First Nations, where those "adopted" members were permitted to settle permanently, to use and occupy traditional lands of their confederates, to enjoy rights of hunting, fishing, and other traditional pursuits, and to join the social and political organizations of those bands. Alternatively, the Pottawatomi could exercise those rights independently, as did the members of the Moose Deer Point First Nation.[491] The First Nation asserts that the Crown not only recognized the right of the Pottawatomi to enjoy aboriginal interests and to surrender their rights, title, and interest pursuant to formal surrenders, but in fact negotiated a surrender of some of those rights as part of the Robinson-Huron Treaty in 1850 and the Williams Treaty in 1923. As counsel stated:

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[488] Written Submission on Behalf of the Moose Deer Point First Nation, August 1, 1997, p. 83.

[489] Written Submission on Behalf of the Moose Deer Point First Nation, August 1, 1997, pp. 74-76; ICC Transcript, April 8, 1998, pp. 97-98 (Gary Nelson).

[490] Written Submission on Behalf of the Moose Deer Point First Nation, August 1, 1997, pp. 81-82; ICC Transcript, April 8, 1998, pp. 12-21 (Gary Nelson).

[491] Written Submission on Behalf of the Moose Deer Point First Nation, August 1, 1997, p. 82.

> I think it is important that the Crown has taken those surrenders, that it has, in effect, recognized that these people were proper parties to these treaties, and I say it would be unconscionable simply to recognize those interests when you're taking a surrender of them, and not recognize those interests when someone else seeks their enforcement.[492]

According to counsel, First Nations do not understand their rights as "aboriginal" or "treaty" rights, but simply as rights of use and occupation: "Under the Canadian system of law they are both 'aboriginal rights' (practices, traditions and customs on the land which are integral to their distinctive culture) and 'treaty rights' (it was the common intention of the parties to the treaty evidenced by the 1837 address that the Pottawatomi and other allies should settle permanently here and carry on with their traditional pursuits)."[493]

Canada characterizes Moose Deer Point's claim as, first, a claim for a larger reserve, and, second, a claim of protection for the First Nation's use and occupation of a broader area of lands and waters for traditional purposes in the vicinity of the location in which the Indians chose to settle.[494] Having said that, however, Canada contends that it is not clear that the First Nation is actually seeking a larger reserve, and, if it is,

> . . . how many additional acres, what is the location of that reserve, when should it have been provided, why is 619 acres not sufficient[?]. . .
>
> And what is the extent of the claim rights, it's a right to do what exactly[?] How is this treaty right being infringed to this day? How do we know that it hasn't been fulfilled? There has been no evidence submitted regarding any infringement or breach of the right.[495]

Canada also asks how the Crown could even attempt to fulfill a purported obligation to provide a reserve when Jarvis's address "completely failed to mention potential reserve locations, reserve size, or a timeframe for the provision of a reserve?" Although the First Nation argues that this lack of specificity on various items in the treaty is simply a matter for negotiation,[496] the fact that the address was silent on these issues indicates, in Canada's view, that "the Crown did not intend to create an obligation to provide a reserve."[497] Even the eventual survey of the First Nation's reserve in 1917 did not result from any recognition on the Crown's part of any obligation to these Indians to create a reserve for their use and benefit.[498] Counsel also submits that there is no evidence that the Pottawatomi, upon their arrival in Canada, expected the Crown to create reserves for them.[499]

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[492] ICC Transcript, April 8, 1998, p. 103 (Gary Nelson).

[493] Written Submission on Behalf of the Moose Deer Point First Nation, August 1, 1997, p. 84.

[494] Reply Submission on Behalf of the Government of Canada, April 1, 1998, p. 27; ICC Transcript, April 8, 1998, p. 163 (Perry Robinson).

[495] ICC Transcript, April 8, 1998, p. 163 (Perry Robinson).

[496] ICC Transcript, April 8, 1998, p. 195 (Gary Nelson).

Canada disagrees fundamentally with Moose Deer Point's submission that land was implicitly promised to the Indians wherever they might choose to settle within the British Empire. In Canada's view, "this broad geographical locale is only mentioned in the context of presents, and not in the context of any land based activities."[500] Although counsel agrees that it is not reasonable to suggest that the Crown invited its native allies north to become "hostages to fortune," he contends that the British contemplated the Indians' settling at Manitoulin Island or on existing reserves, provided that, in the latter case, the Indians were able to secure the approval of established bands to settle on their reserves.[501] In fact, according to Canada, Jarvis's address specifically referred to Manitoulin Island, where land *was* provided and to which the references to fishing and agriculture exclusively related.[502]

Both Canada and Moose Deer Point rely on the principle in *Sioui* that, in the absence of any express language on the term in question, it is to be assumed that the parties to the treaty intended to reconcile the Indians' interests with those of the Crown. According to the First Nation, the interest of its ancestors was to continue their traditional way of life wherever they chose to take up residence, whereas the interests of the Crown were to fulfill its obligations with honour, to have the Indians adopt a more settled way of life over time, and to solve the ongoing problem that the Indian allies caused in the Crown's relations with the United States.[503]

Not surprisingly, Canada takes a different view of the Crown's interest. Counsel argues that it is not realistic to suggest that Britain would have been prepared to guarantee rights of traditional use and occupancy over an area as broad as the British Empire to a group having no such rights in the first place. Similarly, Canada asserts that Britain would not have bound itself to an obligation to protect broadly framed land-based rights that would interfere with the Crown's use of land in Upper Canada when the Crown was at that time in the process of throwing Upper Canada open to settlement. Rather, Canada submits that it would be more realistic and in keeping with Britain's interests in 1837 to conclude that the Crown, through Jarvis's address, invited its Indian allies to take up residence on Manitoulin Island where they could farm and fish for their subsistence.[504]

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[497] Reply Submission on Behalf of the Government of Canada, April 1, 1998, pp. 33-34.

[498] Written Submission on Behalf of the Government of Canada, August 7, 1997, p. 51.

[499] Written Submission on Behalf of the Government of Canada, August 7, 1997, p. 51.

[500] Reply Submission on Behalf of the Government of Canada, April 1, 1998, p. 30.

[501] Written Submission on Behalf of the Government of Canada, August 7, 1997, p. 51; Reply Submission on Behalf of the Government of Canada, April 1, 1998, p. 30; ICC Transcript, April 8, 1998, pp. 164-65 (Perry Robinson).

[502] Reply Submission on Behalf of the Government of Canada, April 1, 1998, p. 30; ICC Transcript, April 8, 1998, p. 165 (Perry Robinson).

[503] ICC Transcript, April 8, 1998, p. 99 (Gary Nelson).

According to Canada, the First Nation is seeking to have the Commission find that the 1837 address embodied a grant of rights of use and occupation over lands traditionally used and occupied by other First Nations. Counsel argues that, based on the decisions of the Supreme Court of Canada in *Guerin* and *Van der Peet*, the Crown did not have the power to grant such rights, the First Nation's claim being, in Canada's view, a claim for recognition of aboriginal rights.[505] In this setting, counsel contends that, "[w]hatever the merits of the [First Nation's] arguments in support of an aboriginal rights claim, the specific claims policy and the Indian Claims Commission Inquiry process are not the appropriate context to put forward aboriginal rights based claims."[506] Canada has nevertheless proceeded on the assumption that the Moose Deer Point First Nation is merely seeking treaty rights that bestow the attributes of aboriginal rights possessed by other First Nations in 1837.[507]

In response to the First Nation's position that both Canada and other bands recognized the rights of the Pottawatomi generally and Moose Deer Point members specifically to use and occupy land, counsel for Canada denies that this was the case. The mere participation of Pottawatomi in the Robinson-Huron and Williams Treaties is not evidence that the Crown recognized rights of use and occupation, since the Crown has consistently taken the position that the Pottawatomi had no right to be included in those treaties. According to Canada, the fact that there were Pottawatomi signatories may merely indicate that they were present when the treaties were signed, since the attending British officers did not normally undertake a detailed investigation of the ancestry of the Indians in attendance. Counsel suggests that the signatures of the Pottawatomi – and indeed of all Indians in attendance – may have been obtained out of "an abundance of caution," regardless of whether those signatories resided within the ceded area.[508] As for the acceptance of Pottawatomi rights of use and occupation by other bands, Canada submits that the reception of the Pottawatomi varied according to the circumstances, and that the significant long-term resistance to the Pottawatomi by some bands rebuts the First Nation's claim that, in all cases, other bands accepted the Pottawatomi and permitted them to use and occupy traditional lands.[509]

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[504] Reply Submission on Behalf of the Government of Canada, April 1, 1998, p. 31; ICC Transcript, April 8, 1998, pp. 169-70 (Perry Robinson).

[505] Written Submission on Behalf of the Government of Canada, August 7, 1997, p. 36.

[506] Reply Submission on Behalf of the Government of Canada, April 1, 1998, p. 29.

[507] Reply Submission on Behalf of the Government of Canada, April 1, 1998, p. 29.

In rebuttal, the Moose Deer Point First Nation disputes Canada's position that the participation of Pottawatomi in treaties does not mean that Canada recognized Pottawatomi rights to use and occupy land. According to the First Nation, that position is based on two letters written 52 and 95 years respectively after the 1837 address,[510] and thus is not indicative of the Crown's policy and practice in the intervening years. Moreover, the First Nation contends that the letters actually related to the entitlement of a family to draw annuities for lands surrendered under treaty – which does not apply to Moose Deer Point since it has not taken part in any treaty – and not to the entitlement of the Pottawatomi to participate in treaty making. As to the argument that some Pottawatomi became signatories to the Robinson-Huron and Williams Treaties out of an abundance of caution, the First Nation submits that this submission is without merit because "[a]ll things are presumed to have been rightly done by public officers acting in the course of their duties (*omnia presumuntur rite esse acta*)"; counsel asserts that this presumption "cannot be overcome by mere supposition as to [the] motives" of the Crown's representatives.[511]

In response to Canada's position that some other bands resisted the use and occupation of their traditional lands by the Pottawatomi, the First Nation counters that the real source of the friction was the "'civilizing and Christianizing' mission of government and its failure to live up to its promises" to provide presents and land.[512] This meant that, although there were some religious differences between Indian groups, and in some cases established bands did not want to share annuity payments they were receiving from prior surrenders, "in general terms, where the Pottawatomi could join confederate

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[508] Written Submission on Behalf of the Government of Canada, August 7, 1997, pp. 38-39.

[509] Written Submission on Behalf of the Government of Canada, August 7, 1997, pp. 39-41.

[510] [L. Vankoughnet, Deputy Superintendent General of Indian Affairs,] to Thomas S. Walton, March 22, 1889, NA, RG 10, vol. 2381, file 78047 (ICC Documents, p. 100); T.R.L. MacInnes, Acting Secretary, Department of Indian Affairs, to Samuel Isaac and others, May 27, 1932, DIAND file 475/30-10-79, vol. 3 (ICC Documents, p. 345).

[511] Reply Submission on Behalf of the Moose Deer Point First Nation, April 3, 1998, p. 10.

[512] Reply Submission on Behalf of the Moose Deer Point First Nation, April 3, 1998, p. 11; ICC Transcript, April 8, 1998, p. 64 (Gary Nelson).

First Nations without being in competition for benefits, or where they could live separately, there is evidence of acceptance."[513] The First Nation also submits that Canada is seeking to "have it both ways" by concurrently arguing, first, that some Pottawatomi were admitted into treaty simply because they were living with and accepted by established bands with whom the Crown's officers were treating, and, conversely, that the Pottawatomi were not accepted by other Indian communities.[514]

Finally, in answer to Canada's assertion that the First Nation had no aboriginal rights over the lands of other bands because those lands were not the First Nation's traditional lands, Moose Deer Point submits that the decision of the Supreme Court of Canada in *R. v. Adams*[515] demonstrates that aboriginal rights do not exist solely where a claim to aboriginal title has been made out.[516]

We will now consider these arguments, looking first at the question of the treaty promise to land and later dealing with the promise of protection.

Land

With respect to the promise of land, the Commission concludes that, although the 1837 address did promise the Indians presents anywhere within the British Empire, the promise to provide land was much more narrowly framed. We appreciate the creative argument urged upon us by counsel for the First Nation that, if the implements of hunting and trapping were to be given as presents to the Indians wherever they might choose to receive them, land and the rights of use and occupation necessary to use those tools should also be given. However, we note that the presents given by the British to their Indian allies consisted of much more than gunpowder, shot, traps, and fishing nets; other items included blankets, pipes and tobacco, kettles, clothing, combs, mirrors, cosmetics, bracelets, medals, and flags. Presumably, many of these presents would have been equally useful and valuable to the Indians regardless of where they resided and what sort of lifestyle they adopted. We do not find that the promise of continuing presents necessarily implied a promise of land and rights of use and occupation anywhere within the British Empire to maintain the Indians' traditional way of life.

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[513] ICC Transcript, April 8, 1998, p. 64 (Gary Nelson).

[514] Reply Submission on Behalf of the Moose Deer Point First Nation, April 3, 1998, p. 12.

[515] *R. v. Adams* (1996), 138 DLR (4th) 657 (SCC).

[516] Written Submission on Behalf of the Moose Deer Point First Nation, August 1, 1997, p. 87; ICC Transcript, April 8, 1998, p. 100 (Gary Nelson).

We agree with the First Nation that there was a common intention that land should be placed at the disposal of the immigrating Indians, but we find that land was set aside for this purpose on Manitoulin Island. In support of this conclusion, we note that, with respect to ***presents***, Jarvis is reported to have said:

> Therefore, although your Great Father is willing that his Red Children should all become permanent Settlers in this Island, it matters not in what Part of the British Empire they reside. They may go across the Great Salt Lake to the Country of their Great Father the King, and there reside and ***there receive their Presents***, or they may remove into any part of the Provinces of Upper and Lower Canada, New Brunswick, Nova Scotia, or any other British Colony, ***and yet receive them***. . . .[517]

It seems incontrovertible from this statement that the incoming Indians might travel freely within the British colonies, and indeed to England itself, and still receive presents. However, with respect to ***land***, Jarvis stated:

> Your Great Father who lives across the Great Salt Lake is your Guardian and Protector, and he only. ***He has relinquished his Claim to this large and beautiful Island on which we are assembled, in order that you may have a Home of your own quite separate from his White Children***. The Soil is good, and the Waters which surround the Shores of this Island are abundantly supplied with the finest of Fish.
>
> If you cultivate the Soil with only moderate Industry, and exert yourselves to obtain Fish, you can never want, and ***your Great Father*** will continue to bestow annually on all those who permanently reside here or in any Part of his Dominions valuable Presents, and ***will from Time to Time visit you at this Place to behold your Improvements***.[518]

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[517] "Address of the Chief Superintendent of Indian Affairs to the Indians assembled in General Council at the Great Manitoulin Island," August 4, 1887, enclosed in Sir F.B. Head to Lord Glenelg, August 22, 1837, No. 41 in ***British Parliamentary Papers***, Vol. 12, "Correspondence, Returns and Other Papers Relating to Canada and the Indian Problem Therein, 1839" (Shannon: Irish University Press, undated) (ICC Exhibit 21, pp. 155-56); see also Jameson, ***Winter Studies and Summer Rambles*** (ICC Exhibit 20, pp. 502-05); NA, RG 10, Records of Chief Superintendent's Office, Upper Canada, 1831-1847, vol. 66, pp. 63741-50 and 63751-57; Memorandum on "Indian Presents," September 23, 1943, DIAND, Claims and Historical Research Centre, Item I-116 (ICC Documents, pp. 348-49). Emphasis added.

[518] "Address of the Chief Superintendent of Indian Affairs to the Indians assembled in General Council at the Great Manitoulin Island," August 4, 1887, enclosed in Sir F.B. Head to Lord Glenelg, August 22, 1837, No. 41 in ***British Parliamentary Papers***, Vol. 12, "Correspondence, Returns and Other Papers Relating to Canada and the Indian Problem Therein, 1839" (Shannon: Irish University Press, undated) (ICC Exhibit 21, pp. 155-56); see also Jameson, ***Winter Studies and Summer Rambles*** (ICC Exhibit 20, pp. 502-05); NA, RG 10, Records of Chief Superintendent's Office, Upper Canada, 1831-1847, vol. 66, pp. 63741-50 and 63751-57; Memorandum on "Indian Presents," September 23, 1943, DIAND, Claims and Historical Research Centre, Item I-116 (ICC Documents, pp. 348-49). Emphasis added.

We take from this statement the intention on the part of the British to provide lands to the incoming Indian allies in locations where they would be isolated from white settlers – "a Home of your own quite separate from his White Children." This expressly included "this large and beautiful Island on which we are assembled" – Manitoulin Island. Of course, it might also be inferred that this would also include other areas not yet settled or desired by white settlers, provided the Crown was prepared to allow Indians to reside there, or on reserves that had already been established by other bands, provided those bands were also prepared to consent. However, the evidence before the Commission indicates that, within the immediate time frame of the 1837 council, the Crown was prepared to allow its incoming allies to settle on the reserves of those bands that might have them, but it was otherwise not at all inclined to permit Indians in areas other than Manitoulin Island.

Although the Crown was willing to "continue to bestow annually on all those who permanently reside here or in any Part of his Dominions valuable Presents," it is notable that Jarvis added that the Crown's representatives "will from Time to Time visit you *at this Place* to behold your Improvements." The implication of this statement and the preceding ones, in our view, is that the Indians were welcome to establish homes and improve the land on Manitoulin Island. It was only to this location that the Crown would come to "behold" the Indians' improvements. Although Britain indicated a willingness to continue to provide presents anywhere in the empire to those Indians who emigrated permanently from the United States, and while it was presumably open to the Crown to agree to provide land to its allies at any location within the empire, there is no indication of any willingness to have the Indians establish improvements other than "at this Place" – Manitoulin Island.

This conclusion is sustained by the historical background during the years preceding Jarvis's address. In 1829, the Indian policy inaugurated by Lieutenant Governor John Colborne involved consolidating Indians on small reservations where they could be re-educated, trained, and "civilized."[519] The Colborne plan sought to "balance conscience and pocket-book,"[520] "the liberal-minded but economically-fixated imperial authorities . . . [being] fully aware that the Indians in the Canadian colonies were becoming increasingly destitute and unable either to sustain their traditional lifestyle or to defend their land and property."[521] The plan had four main components: to collect the Indians in considerable numbers and to settle them in villages (reserves) with a due portion of land for their cultivation and support; to make provision for their religious improvement, education, and instruction in husbandry; to afford them assistance in building houses and in procuring seed and agricultural implements, "commuting when practical, a portion of their presents for the latter"; and to provide "active and zealous" Wesleyan missionaries to counteract the effects of the "objectionable principles" instilled by the Methodist missionaries.[522]

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[519] James A. Clifton, "'Visiting Indians' in Canada," manuscript for Parks Canada booklet, 1979 (ICC Exhibit 11, p. 39).

[520] Allen, *His Majesty's Indian Allies* (ICC Exhibit 4, p. 181).

[521] Allen, *His Majesty's Indian Allies* (ICC Exhibit 4, p. 181).

As we have already seen, the Colborne plan met with mixed success. However, within a few months of the arrival of Sir Francis Head to succeed Colborne as Lieutenant Governor, he advised shipping the "few remaining Indians who are lingering in Upper Canada" to "Manitoulin Island and other Islands in Lake Huron, or elsewhere towards the North West."[523] While Head's policy was clearly geared towards removing and isolating the Indians from white settlers, it can be seen that the Colborne plan, while aimed at eventual "civilization" and integration, was initially no less segregationist.

Similarly, in the years following the 1837 council, British policy continued to demonstrate that the Indians were not intended to be free to take up land wherever they chose. For example, on February 17, 1840, Jarvis wrote with regard to the arrival of 222 members of the Manicoupouts Band from the United States:

> I sincerely hope that none of this Band will adhere to what appears to me to be their intention, viz. of remaining on the St. Clair, the Government are [sic] extremely anxious that all those Indians who came in from the United States should proceed on to the Manitoulin Island, they have decided on maintaining that establishment and will not in future go to any expense elsewhere.[524]

Moreover, as we have already seen, Jarvis instructed his Superintendents in May of that year to encourage those Pottawatomi who had taken up residence on Walpole Island to proceed to Manitoulin Island, since "[t]hey must not expect to be assisted by Government unless they do go there."[525] On June 22, 1840, J.W. Keating advised Jarvis that he intended to tell some newly arrived

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[522] Allen, *His Majesty's Indian Allies* (ICC Exhibit 4, p. 181).

[523] Sir F.B. Head to Lord Glenelg, November 20, 1836 (ICC Documents, p. 8).

[524] S.P. Jarvis, Chief Superintendent, to unknown ["either to J.W. Keating, Walpole Island, or Wm. Jones, Port Sarnia"], February 17, 1840, NA, RG 10, C-11025, vol. 72, pp. 67179-80, cited in "Pottawatomie Correspondence Collected by Franz Koennecke" (ICC Exhibit 15, p. 9).

[525] S.P. Jarvis, Chief Superintendent, to unknown ["probably either J.W. Keating, Walpole Island, or Wm. Jones, St. Clair"], May 9, 1840, NA, RG 10, C-11026, vol. 73, pp. 67704-06, cited in "Pottawatomie Correspondence Collected by Franz Koennecke" (ICC Exhibit 15, pp. 9-10).

"Saginaws" that "they must go to [Manitoulin] Island unless they were prepared to dispence [sic] with all assistance from government in the way of land to cultivate or clothing."[526] It was in this same correspondence that Keating reported his unsuccessful efforts to direct other Indians, including Pottawatomi, to go there as well, and cynically noted how the Indians might eventually be persuaded:

> [T]hey will not be guided & . . . do not I believe anticipate the consequences I have predicted to them . . . it will only be when they find themselves naked & hungry which they will [be] in a year or so that they will succumb. That will I think be the best way of proceeding. [L]et . . . them suffer, & want presents & they will become tractable & plastic enough.[527]

Even as late as 1852, in his speech regarding the termination of presents, Indian Superintendent Anderson referred to the intention to settle the Indians on Manitoulin Island:

> Reflect seriously on what I have said and recollect, I again repeat it, that Your Great Father will not encourage your remaining in small bands, nor will he help you to settle on any Island unless it be the Great Manitoulin.[528]

Assistance in the form of land, then, was contingent on the Pottawatomi and other Indians locating on Manitoulin Island or other Crown-sanctioned locations.

Even applying a generous and liberal approach, we are unable to conclude that the 1837 council included a promise that reserve lands would be set aside for the Pottawatomi wherever they might settle. The fact that the Indians were advised they could receive their presents even "across the Great Salt Lake" (that is, in England), where reserve lands would most certainly not have been made available, suggests otherwise.

We should add that we have taken note of Canada's argument that land other than Manitoulin Island did not comprise part of the promises because terms such as the area to be provided, the location of these other lands, and the date when such lands should be set apart were not stipulated. While this may be true, the lack of specificity is not, in our view, decisive. Many of the same shortcomings are evident with respect to the promise of land at Manitoulin Island; yet, to the extent that Canada is prepared to concede that the 1837 council created binding obligations at all, it has acknowledged that the Indians were promised a place to settle there.[529] In this context, we note that, at the end of oral submissions in this inquiry, Commissioner Corcoran asked counsel for Canada whether the Moose Deer Point First Nation might have an outstanding claim to land on Manitoulin Island, and, notwithstanding the lack of specificity, counsel conceded that, if the First Nation submitted a further claim, Canada would have to consider it.[530] It is also worth mentioning that even the numbered treaties in western Canada were plagued by what modern legal draftsmen might consider inattention to detail with respect to such matters, but Canada has nevertheless been prepared to recognize its binding obligations arising from those instruments.

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[526] J.W. Keating, Indian Superintendent, Sutherlands, to S.P. Jarvis, Chief Superintendent, June 22, 1840, NA, RG 10, vol. 73, pp. 67819-20, cited in "Pottawatomie Correspondence Collected by Franz Koennecke" (ICC Exhibit 15, p. 11).

[527] J.W. Keating, Indian Superintendent, Sutherlands, to S.P. Jarvis, Chief Superintendent, June 22, 1840, NA, RG 10, vol. 73, pp. 67819-20, cited in "Pottawatomie Correspondence Collected by Franz Koennecke" (ICC Exhibit 15, p. 11).

[528] "Address of T.G. Anderson, Superintendent of Indian [A]ffairs[,] to the Chippewa, Potawatimie and Mohawk Indians under his Superintendence on the occasion of his making the last issue of Presents to be made to the settled Indians in Upper Canada," September 27, 1852, NA, RG 10, vol. 268, pp. 163978 (ICC Exhibit 22).

The Commission therefore concludes that the 1837 address included an express promise to provide land at Manitoulin Island. In light of the lack of specificity in the address regarding the particulars of reserve size, and the lack of evidence regarding the amount of treaty land that other bands received, we are unable to conclude at this point whether this treaty right has been satisfied by the provision of 619 acres to the First Nation in 1917. The parties have filed some evidence regarding the amount of reserve land received by the First Nation relative to other First Nations,[531] but we have not received any submissions dealing with this evidence and are thus unable to gauge its significance. Accordingly, we recommend that the parties attempt to negotiate a settlement of the treaty land entitlement issue, failing which it is open to the First Nation to request a further inquiry to establish the area of land to which it is entitled.

It may not be possible at this late date for Canada to satisfy any outstanding right of the First Nation to treaty land by delivering land on Manitoulin Island, and we are not sure that, even if such an entitlement exists, the First Nation would even want land there. Clearly, the Crown has already provided the First Nation with some land at Moose Deer Point. If other land is available in that vicinity, it could perhaps form part of a settlement package, assuming that an outstanding entitlement exists. If no such land is available, then the parties may have to resort to alternative forms of consideration. We are aware that other treaty land entitlement claims have been resolved by Canada's payment of consideration in forms more readily available and better suited to the needs of the First Nation involved. In either event, the 619-acre reserve established for the First Nation in 1917 must be factored into the settlement to ensure that the First Nation is not overcompensated in terms of any outstanding treaty land entitlement it may have.

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[529] ICC Transcript, April 8, 1998, p. 212 (Perry Robinson).

[530] ICC Transcript, April 8, 1998, p. 213 (Perry Robinson).

[531] Ian Johnson, United Indian Councils, to Larry Gilberg, December 9, 1992, with attached table entitled "Population Density Comparisons: Urban Reserves" (ICC Documents, pp. 357-58).

Protection

The second aspect of Moose Deer Point's land-related claims involves asking whether the First Nation is entitled to "protection" in the use and occupation of its own reserve lands, but also in relation to its use and occupation of nearby lands for traditional purposes such as hunting, trapping, and fishing. As we have already seen, the submission of the First Nation is that the Crown promised to protect the Pottawatomi from encroachment by white settlement, including development in the vicinity of their reserves that would tend to limit their ability to make effective use of adjoining lands for such traditional purposes. In making this argument, the First Nation submits that the promise of protection gives rise to a fiduciary duty arising not from the nature of aboriginal title and its alienability, as was the case in *Guerin*,[532] but from the agreement or undertaking of the Crown to act as guardian and protector.[533] A determination of whether this is so requires an examination of what the nature and scope of a promise of British protection may have meant in 1837. We must also consider whether the promise of British protection extended to the use and occupation of lands wherever the Pottawatomi might take up residence, including their ultimate settlement at Moose Deer Point.

While the factual and contextual information before us on the meaning of "protection" as used in the 1837 address is sketchy and incomplete, we know that the terms of the *Royal Proclamation of 1763* reserved for aboriginal peoples throughout much of what is now Ontario[534] possession of their unceded lands and territories as a hunting ground. The terms of the *Proclamation*, which excluded all but licensed traders from travel within the territories, described the area as a hunting ground for those nations living under British "protection." It was as a result of the *Royal Proclamation* that surrenders of land were required from those Indians inhabiting the lands within the *Proclamation* territory before those lands could be used for settlement. The *Royal Proclamation* states:

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[532] *Guerin v. The Queen*, [1984] 2 SCR 335.

[533] Written Submission on Behalf of the Moose Deer Point First Nation, August 1, 1997, pp. 74-75.

[534] The *Royal Proclamation* exempted the Hudson's Bay Charter of 1670, and lands north of the height of land.

> And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that *the several Nations or Tribes of Indians* with whom We are connected, and *who live under our Protection, should not be molested or disturbed in the Possession of such part of our Dominions and Territories as not having been ceded to or purchased by Us, are reserved to them or any of them, as their Hunting Grounds.*
>
> . . . We do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve under our Sovereignty, Protection, and Dominion, for the use of the said Indians, all the Lands and Territories not included with the Limits of Our said Three new Governments, or within the Limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West. . . .[535]

In *White and Bob*, Justice Norris stated that the promise of protection within the *Royal Proclamation* was afforded to the use of lands:

> It is clear that what was thus reserved to them under the *Royal Proclamation* was not mere possession but *use* of the lands. All our Indian lore tells us of the use to which the Indians had been accustomed to put those lands. They used them primarily – to adopt the language in the recital – "as their Hunting Grounds". They lived by hunting and foraging. The wild life inhabiting the forests, the lakes and rivers to a large extent was the source of their food supplemented only by what, in accordance with their primitive knowledge, they were able to grow on the land. . . . The aboriginal rights as to hunting and fishing affirmed by the *Royal Proclamation of 1763* and recognized by the treaty still exist.[536]

At the time of the Pottawatomi relocation, therefore, the entire *Royal Proclamation* area had been protected as one vast "Indian hunting ground." The magnitude of the presents provided to the Pottawatomi and others certainly evidence the extent to which aboriginal peoples hunted and fished at the time. We accept that, in the context of the 1837 address, it is unlikely that the Pottawatomi would have relocated to Canada, in many cases giving up annuities in the United States in exchange for the continuation of presents, had such basic and fundamental life-supporting activities as hunting and fishing been impaired in any way. This is so despite the Crown's developing "civilization" policy that had as its objective the curtailing of such pursuits in favour of an agricultural existence.

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[535] *Royal Proclamation of 1763*, RSC 1985, Appendices, No. 1, 4-5. Emphasis added.

[536] *R. v. White and Bob* (1964), 50 DLR (2d) 613 at 664 (BCCA), affirmed [1965] SCR vi, 52 DLR (2d) 481. Emphasis added. Norris J was quoting from the reasons of Roach JA in *Attorney-General (Canada) v. George*(1964), 45 DLR (2d) 709, [1965] 2 CCC 148, [1964] 2 OR 429 at 712-13 (DLR) (Ont. CA).

To be self-sustaining rather than a drain on the public purse, the Pottawatomi had to be free to hunt and fish once they relocated to Canada. Notwithstanding this understanding, it is common ground between the parties that, unlike other First Nations, the Moose Deer Point First Nation "does not have aboriginal title arising from historic occupation and possession of tribal lands before the assertion of sovereignty" by the European powers.[537]

The Commission finds parallels between the council of 1837 and later treaties that also protected the Indians' right to continue to hunt, trap, and fish. For example, in their report relating to the creation of Treaty 8, Treaty Commissioners David Laird, J.H. Ross, and J.A.J. McKenna commented regarding the initial reluctance of the Indians of that area to enter treaty:

> Our chief difficulty was the apprehension that the hunting and fishing privileges were to be curtailed. The provision in the treaty under which ammunition and twine is to be furnished went far in the direction of quieting the fears of the Indians, for they admitted that it would be unreasonable to furnish the means of hunting and fishing if laws were to be enacted which would make hunting and fishing so restricted as to render it impossible to make a livelihood by such pursuits. But over and above the provision, we had to solemnly assure them that only such laws as to hunting and fishing as were in the interest of the Indians and were found necessary in order to protect the fish and fur-bearing animals would be made, and that they would be as free to hunt and fish after the treaty as they would be if they never entered into it. . . .
>
> The Indians are given the option of taking reserves or land in severalty. As the extent of the country treated for made it impossible to define reserves or holdings, and as the Indians were not prepared to make selections, we confined ourselves to an understanding to have reserves and holdings set apart in the future, and the Indians were satisfied with the promise that this would be done when required. There is no immediate necessity for the general laying out of reserves or the allotting of land. *It will be quite time enough to do this as advancing settlement makes necessary the surveying of the land*. Indeed, the Indians were generally averse to being placed on reserves. It would have been impossible to have made a treaty if we had not assured them that there was no intention of confining them to reserves. We had to very clearly explain to them that the provision for reserves and allotments of land were made for their protection, and to secure to them in perpetuity a fair portion of the land ceded, *in the event of settlement advancing*.[538]

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[537] Reply Submission on Behalf of the Moose Deer Point First Nation, April 3, 1998, p. 3.

[538] "Report of Commissioners for Treaty No. 8," September 22, 1899, in *Treaty No. 8 made June 21, 1899 and Adhesions, Reports, etc.* (Ottawa: Queen's Printer and Controller of Stationery, 1966), 6-7. Emphasis added.

Ultimately, Treaty 8 stipulated:

> And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have [the] right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and *saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.*[539]

There are similar provisions in the Robinson-Huron and Robinson-Superior Treaties of 1850, as well as the remaining numbered treaties from Treaty 3 to 11. From these excerpts it can be seen that, until the Indians were ready to settle on reserves and convert to agriculture-based subsistence, the Crown was prepared to allow them to continue to hunt, trap, and fish as if they had never entered into treaty. They would receive treaty goods suited to hunting until they took up farming, at which time agricultural implements would be substituted. However, in the Commission's view, it is significant that the Crown's protection of these traditional rights excepted tracts that would eventually be taken up for "settlement, mining, lumbering, trading or other purposes."

In light of these provisions, it becomes necessary to determine the impact of the arrival of white settlers on those traditional rights of use and occupation: Would the Crown continue to respect and protect traditional Indian rights, or would settlement and development prevail? This issue was considered by the Supreme Court of Canada in *Sioui*, in which, as we have seen, Lamer J was called upon to consider the Hurons' use of park lands for ceremonial purposes. He concluded that, rather than one use eclipsing the other, the two uses should, to the extent possible, be reconciled:

> Even a generous interpretation of the document . . . must be realistic and reflect the intention of both parties, not just that of the Hurons. *The Court must choose from among the various possible interpretations of the common intention the one which best reconciles the Hurons' interests and those of the conqueror.*
>
> On the other hand, to accept the argument that the parties intended to limit the scope of the treaty to the Lorette territory would mean introducing a very severe restriction that is not justified by the wording of the document since Lorette is mentioned only as a destination for safe-conduct purposes. Given the nature of Indian

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[539] *Treaty No. 8 made June 21, 1899 and Adhesions, Reports, etc.* (Ottawa: Queen's Printer and Controller of Stationery, 1966), 12. Emphasis added.

> religious rites and especially Indian customs at the time, any significant exercise of such rights would require territory extending beyond Lorette. . . .
>
> Accordingly, I conclude that in view of the absence of any express mention of the territorial scope of the treaty, *it has to be assumed that the parties to the treaty of September 5 intended to reconcile the Hurons' need to protect the exercise of their customs and the desire of the British conquerors to expand. Protecting the exercise of the customs in all parts of the territory frequented when it is not incompatible with its occupancy is in my opinion the most reasonable way of reconciling the competing interests*. This, in my view, is the definition of the common intent of the parties which best reflects the actual intent of the Hurons and of [General] Murray on September 5, 1760. *Defining the common intent of the parties on the question of territory in this way makes it possible to give full effect to the spirit of conciliation, while respecting the practical requirements of the British*. This gave the English the necessary flexibility to be able to respond in due course to the increasing need to use Canada's resources, in the event that Canada remained under British suzerainty. *The Hurons, for their part, were protecting their customs wherever their exercise would not be prejudicial to the use to which the territory concerned would be put. The Hurons could not reasonably expect that the use would forever remain what it was in 1760*. Before the treaty was signed, they had carried on their customs in accordance with restrictions already imposed by an occupancy incompatible with such exercise. The Hurons were only asking to be permitted to continue to carry on their customs on the lands frequented to the extent that those customs did not interfere with enjoyment of the lands by their occupier. I readily accept that the Hurons were probably not aware of the legal consequences, and in particular of the right to occupy to the exclusion of others, which the main European legal systems attached to the concept of private ownership. Nonetheless I cannot believe that the Hurons ever believed that the treaty gave them the right to cut down trees in the garden of a house as part of their right to carry on their customs. . . .[540]

In the present case, we similarly find that, although the parties to the 1837 council clearly did not contemplate that some of the Pottawatomi would settle at Moose Deer Point and be given a reserve there, we cannot believe that they would have expected those Indians to continue their traditional hunting, trapping, and fishing activities on a severely limited land base like the three parcels, totalling 619 acres, which members of the First Nation were given in 1917 to maintain their homes and gardens. As Lamer J stated, given the nature of traditional hunting, fishing, and trapping activities, "any significant exercise of such rights would require territory extending beyond," in this case, reserve lands dedicated to residential and agricultural pursuits. We conclude that the parties must have expected that the Indian participants in the council of 1837 would make wide use of unsettled and undeveloped territories to exercise their traditional rights protected by the treaty.

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[540] *R. v. Sioui*, [1990] 1 SCR 1025 at 1069 and 1071-72. Emphasis added.

By the same token, the Pottawatomi, like the Hurons in *Sioui*, must be taken as recognizing that the increasing demands of settlement and development would mean that lands still open in 1837 would eventually be taken up for other uses. Again, like the Hurons, they could only expect "to be permitted to continue to carry on their customs on the lands frequented to the extent that those customs did not interfere with enjoyment of the lands by their occupier." It must be considered that the Indians would have understood that they would continue to enjoy their traditional rights only until such time as the lands on which they were able to exercise those rights were taken up for settlement or other purposes of the Crown. Ultimately, as Lamer J commented, the Indians had to know that their traditional rights would be whittled down as the lands around them became settled and developed, but the Crown must likewise have been prepared to accept that those rights could be exercised as long as they were not incompatible with the new uses and occupancies arising around them.

How is it to be determined when the Indians' traditional rights of use and occupation have become incompatible with new settlement and development? Once again, the words of Lamer J in *Sioui* are instructive:

> Since, in view of the situation in 1760, we must assume some limitation on the exercise of rights protected by the treaty, *it is up to the Crown to prove that its occupancy of the territory cannot be accommodated to reasonable exercise of the Hurons' rights.*
>
> The Crown presented evidence on such compatibility but that evidence did not persuade me that exercise of the rites and customs at issue here is incompatible with the occupancy. . . .
>
> *For the exercise of rites and customs to be incompatible with the occupancy of the park by the Crown, it must not only be contrary to the purpose underlying that occupancy, it must prevent the realization of that purpose.* First, we are dealing with Crown lands, lands which are held for the benefit of the community. Exclusive use is not an essential aspect of public ownership. Second, I do not think that the activities described seriously compromise the Crown's objectives in occupying the park. Neither the representative nature of the natural region where the park is located nor the exceptional nature of this natural site are threatened by the collecting of a few plants, the setting up of a tent using a few branches picked up in the area or the making of a fire according to the rules dictated by caution to avoid fires. These activities also present no obstacle to cross-country recreation. I therefore conclude that it has not been established that occupancy of the territory of Jacques-Cartier park is

> incompatible with the exercise of Huron rites and customs with which the respondents are charged.[541]

It can be seen from the foregoing passage that the onus is on the Crown to establish that the First Nation's traditional rights of use and occupation are incompatible with subsequent settlement and development authorized by the Crown. However, this conclusion presumes that the First Nation has already demonstrated what its traditional rights of use and occupation *are*. The Commission is by no means satisfied that the nature and extent of the First Nation's traditional rights have been revealed by the evidence in this inquiry. We believe that it is incumbent on the Moose Deer Point First Nation first to prove those rights that it claims are subject to the treaty's protection, at which time it will be open to Canada either to challenge those claims as not being valid treaty rights or to establish that the Indians' occupancy of the territory is contrary to the purpose underlying the Crown's occupancy or prevents the realization of that purpose.

In this inquiry, the Moose Deer Point First Nation has done little to describe or delineate the hunting, fishing, and trapping rights claimed to have been protected by the 1837 council. That such traditional rights were implied in the invitation to relocate is perhaps obvious. However, we were provided with little evidence as to the exercise or continuity of the traditional rights being claimed, the location in which hunting and fishing activities took place, the magnitude of such activities, whether they were commercial or for sustenance purposes, and so on. Nor did the First Nation indicate the manner in which the alleged encroachment of settlement and development had interfered with such rights. Since we have insufficient evidence to determine the territorial scope of the traditional rights claimed, or even the nature of those rights, we are unable to make any clear finding in this area other than the general statements of principle already set forth. As with our conclusion regarding the First Nation's land claim, we recommend that, with these general statements of principle in hand, the parties seek to negotiate a resolution of the claim to protection, failing which they can refer the question back to the Commission for further recommendations.

We turn now to the final promise claimed by the First Nation to have been made by Jarvis in 1837 – equality of treatment.

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[541] *R. v. Sioui*, [1990] 1 SCR 1025 at 1072-73. Emphasis added.

Equality

Moose Deer Point argues that another basis for concluding that Canada owes it an outstanding lawful obligation is that, in conjunction with the treaty promises of presents and land, the Crown promised that it would treat the Pottawatomi equally with other First Nations. Moose Deer Point submits that the Crown has failed to provide, or to provide in a timely way, sufficient land to members of the First Nation to enable them to carry on their traditional existence and to make the transition over time to a more modern economy. Instead, the Moose Deer Point people have been treated as a "marginal group" with "no treaty rights, no rights to use of land, no entitlement to annuity payments, and no entitlement to any assistance."[542] As counsel states:

> This view has grown up and is still repeated: despite the Crown's undertaking to its allies and the native allies' contribution on behalf of the Crown in the War of 1812, they have no rights here. Protests concerning the ending of the practice of distributing presents were ignored. Requests for land were ignored. Requests to be treated on an equitable basis with other First Nations in the area have been put off. The official attitude is that the U.S. native allies are refugees with claims on the grace and benevolence of the Crown and nothing more.[543]

By way of response, Canada asserts that "the evidence is conclusive that the promises made to the ancestors of the First Nation were as follows: as Indian allies they were welcome to move to Upper Canada; if they did so, they would continue to receive presents and would be treated in the same way as other Indians in the Province."[544] However, counsel argues that the claim as framed by Moose Deer Point is "too vague to address"; although the First Nation bears the burden of proving a *prima facie* infringement of the right claimed, it has "failed to provide even the particulars of the right being asserted," how it is to be realized, or how it has been infringed, making it "impossible to bring appropriate evidence to bear in the assessment of the claim."[545] In short, Canada submits:

> With respect to the promise that the Indian allies would be treated in the same way as other Indians in Upper Canada, we would point out that there was no one way in which the Upper Canada Indians were treated, but rather endless variations. The circumstances of each band were distinct. Some received regular annuities, pursuant to

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[542] Written Submission on Behalf of the Moose Deer Point First Nation, August 1, 1997, pp. 90-91.
[543] Written Submission on Behalf of the Moose Deer Point First Nation, August 1, 1997, p. 91.
[544] Written Submission on Behalf of the Government of Canada, August 7, 1997, p. 33.
[545] Reply Submission on Behalf of the Government of Canada, April 1, 1998, p. 34.

> treaties in which they had surrendered their aboriginal title. Others had been provided with lump-sum payments for those surrenders, and resided on land either reserved from the treaties, or set apart for them by the Crown or missionary societies. Still others lived on reserves purchased from their own funds. It is submitted that this promise meant nothing more nor less than an assurance that the Indian allies would be subject to the same laws and policies as other Indians in Upper Canada.[546]

Canada submits that, although presents were discontinued, other programs and policies, "appropriate to the time in which they were in force," were substituted, and that the First Nation has been treated "in the same way as other *Indian Act* bands in Canada."[547]

Canada and the Moose Deer Point First Nation appear to concur that the immigrating Indian allies were entitled to be treated on the same basis as Indians already residing in Upper Canada. The Commission agrees that, by virtue of the promises that had the effect of inducing the Pottawatomi and other native allies to leave the United States, Britain must be considered to have at least undertaken to treat its allies equitably with their aboriginal peers in Canada. We have reviewed the record of Jarvis's address and find some sense of this obligation in the following paragraph:

> Children, – Your Great Father the Lieutenant Governor, as a token of the above Declaration, transmits to the Indians a Silk British Flag, which represents the British Empire. Within this Flag, and immediately under the Symbol of the British Crown, are delineated a British Lion and a Beaver; by which is designated that *the British People and the Indians, the former being represented by the Lion and the latter by the Beaver, are and will be alike regarded by their Sovereign so long as their Figures are represented on the British Flag, or in other Words, so long as they continue to inhabit the British Empire.*[548]

Upon their arrival in Canada, various Pottawatomi clans and clan segments reacted in different ways to their circumstances. A few appear to have respected the urgings of Crown representatives like Jarvis and Keating by taking up residence at Manitoulin Island; most received the benefit of annui-

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546 Written Submission on Behalf of the Government of Canada, August 7, 1997, p. 52.

547 Written Submission on Behalf of the Government of Canada, August 7, 1997, p. 56.

548 "Address of the Chief Superintendent of Indian Affairs to the Indians assembled in General Council at the Great Manitoulin Island," August 4, 1887, enclosed in Sir F.B. Head to Lord Glenelg, August 22, 1837, No. 41 in *British Parliamentary Papers*, Vol. 12, "Correspondence, Returns and Other Papers Relating to Canada and the Indian Problem Therein, 1839" (Shannon: Irish University Press, undated) (ICC Exhibit 21, pp. 155-56); see also Jameson, *Winter Studies and Summer Rambles* (ICC Exhibit 20, pp. 502-05); NA, RG 10, Records of Chief Superintendent's Office, Upper Canada, 1831-1847, vol. 66, pp. 63741-50 and 63751-57; Memorandum on "Indian Presents," September 23, 1943, DIAND, Claims and Historical Research Centre, Item I-116 (ICC Documents, pp. 348-49). Emphasis added.

ties or lands through their acceptance as full members into existing Indian communities; however, still others were driven – repeatedly, in some cases – from the land they had cleared by settlers and members of other First Nations.

In the case of the ancestors of the Moose Deer Point First Nation, they eventually settled in the vicinity of their present reserve, at the time relatively remote and isolated, where it appears they remained for a number of years before the Crown even became aware of their existence there. Although some fellow Pottawatomi joined settled First Nations and received treaty benefits, it seems apparent that the members of Moose Deer Point were not considered to have aboriginal title or rights that could be ceded in exchange for treaty rights; accordingly, they were not given the opportunity to participate in either the Robinson-Huron Treaty of 1850 or the Williams Treaty of 1923.

In the 1850s, Ogemawahj and his people, like all other Indians in Upper Canada, ceased receiving presents from the Crown. At that time, as we have seen, Ogemawahj objected on the basis that his people were disadvantaged relative to other Indians:

> Father,
> We, Potawatomies are poor. We do not receive annuities, we don't know how we can provide clothing for our families when we get no more Presents. This we wish our Great Father to know.
>
> Father,
> We say again and we wish our Great Father to hear it, we have nothing to depend upon for a living, and hope he will continue to give us this bounty as he told our fathers he would do. He said he would continue to give us Presents as long as the sun should appear in the sky.[549]

In 1917, the people of Moose Deer Point received their 619-acre reserve, perhaps because the Crown belatedly recognized that it had certain responsibilities to the First Nation as a result of the promises made many decades earlier. More likely, from the evidence before us, the reserve was set apart for the First Nation because of political lobbying undertaken by a well-connected private individual, Wallace Nesbitt, who had become friendly with certain members of the community and had taken up their cause.

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[549] "Address of T.G. Anderson, Superintendent of Indian [A]ffairs[,] to the Chippewa, Potawatimie and Mohawk Indians under his Superintendence on the occasion of his making the last issue of Presents to be made to the settled Indians in Upper Canada," September 27, 1852, NA, RG 10, vol. 268 (ICC Exhibit 22, p. 163980).

On these facts, the Commission finds that, in the technical sense argued by Canada, the members of the Moose Deer Point First Nation appear to have been treated *equally* with other Indians in Upper Canada. However, we are far from convinced that they have been treated *equitably*. To clarify by way of example, it might be argued that a poor man has been treated equally to a rich man if the poor man is subject to the same *amount* or even the same *rate* of tax; however, the entire scheme of the *Income Tax Act* is based on the premise that equal taxation is not necessarily equitable taxation. As a result, higher income earners are treated as having a greater ability to pay, and thus pay at a higher rate, are subject to more surtaxes, and are more likely to have certain benefits "clawed back." In the case of Indians generally and the residents of Moose Deer Point in particular, all had their presents withdrawn, but some were better able than others to absorb the loss by virtue of annuities and the benefits they could derive from their treaty lands. Having relinquished any claim to land rights in the United States to come north in reliance on the promises made by the British Crown, the Moose Deer Point First Nation had neither of these offsetting advantages, and thus had a correspondingly reduced ability to absorb the loss.

That being said, we are not in a position to assess the impact of these inequities in terms of the extent to which the First Nation has suffered as a result of the breach of its right to equality. Accordingly, we recommend that the parties negotiate this issue and refer the matter back to the Commission for further recommendations if they are unable to reach a negotiated settlement.

ISSUE 3 LAWFUL OBLIGATION

Does the Crown have an outstanding lawful obligation to the Moose Deer Point First Nation?

Having found that the council of 1837 gave rise to a treaty, and having considered the nature and scope of the Moose Deer Point First Nation's rights arising out of that treaty, it is now left to the Commission to determine whether Canada owes the First Nation any outstanding lawful obligations as a result of the Crown's implementation, or failure to implement, the terms of the treaty.

The First Nation begins with the premise that treaties or agreements made by the British with their Indian allies are binding on the Crown in right of

Canada.[550] Canada has not disputed this point, and, indeed, in light of cases like *Sioui* in which the Supreme Court of Canada has proceeded on that very basis, we must concur that there is no issue on this question.

With respect to presents, Moose Deer Point submits that it would be unsound to suggest that the common intention of the parties in 1837 was that the entitlement to presents would end in the 1850s and that thereafter Britain's native allies would receive nothing except what they would obtain as members of other First Nations or, in the case of the Moose Deer Point First Nation, nothing at all. In the First Nation's view, the Crown has failed, since the 1850s, to provide presents pursuant to the treaty, and has furnished only inadequate educational, health, and relief benefits and, in 1917, a similarly inadequate reserve.[551]

On the subject of land, the First Nation contends that the provision of the modest 619-acre reserve in 1917 did not fulfill the promises made 80 years previously. According to counsel, the reserve resulted from the efforts of a benefactor, and the amount of land provided was a "mistake." In the result, the Crown failed to provide, or to provide in a timely way, sufficient lands to enable the First Nation to carry on its traditional economy and to make the eventual transition to a more modern economy.[552]

With respect to protection, Moose Deer Point asserts that it has not been protected in its use and occupation of lands and waters in the area of its reserve for traditional purposes. Not only have its rights not been recognized but advancing settlement and development, and increasingly restrictive game and fishing laws, have "practically deprived [the First Nation] of the use of the land."[553] Similarly, Moose Deer Point submits that, in treating the First Nation as a marginal group without any claim or entitlement, the Crown has failed to fulfill its promise of equality.[554]

In summary, the First Nation claims that, because the Crown has long considered the members of the First Nation to be self-reliant, Canada has taken this independence to mean that, notwithstanding requests for assistance since at least 1877, the First Nation has not required, and is not entitled to, the benefits promised by Jarvis. The First Nation submits that Canada owes it an outstanding lawful obligation, and that this claim should therefore be accepted for negotiation.[555]

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[550] Written Submission on Behalf of the Moose Deer Point First Nation, August 1, 1997, p. 86.

[551] Written Submission on Behalf of the Moose Deer Point First Nation, August 1, 1997, pp. 87 and 89; ICC Transcript, April 8, 1998, p. 107 (Gary Nelson).

[552] Written Submission on Behalf of the Moose Deer Point First Nation, August 1, 1997, pp. 86-87 and 89; ICC Transcript, April 8, 1998, pp. 106-07 (Gary Nelson).

[553] Written Submission on Behalf of the Moose Deer Point First Nation, August 1, 1997, p. 90.

[554] Written Submission on Behalf of the Moose Deer Point First Nation, August 1, 1997, pp. 90-91.

Canada, by contrast, does not agree with the characterization of either the nature or the scope of the promises as claimed by the First Nation. In particular, it argues that the Crown did not breach any obligation by allowing lands used and occupied by the First Nation to be developed and settled; those lands were surrendered to the Crown by bands which had historically used and occupied the area, and there was no legal impediment to prevent the Crown from granting ownership or other rights in these lands for purposes of settlement and development.[556]

Canada denies that the promises made by Jarvis constituted a treaty, but contends that, even if they did, the Crown fulfilled its promises. Counsel submits that it was intended that the Indians locate on Manitoulin Island or, with the acceptance of bands for whose use and benefit reserves had already been set aside, on the reserves of those bands; most of the incoming Indians chose the latter course, although some, like the ancestors of the Moose Deer Point First Nation, elected to settle on other lands. Although Britain discontinued presents in the 1850s, it did so for all Indians and substituted other programs and policies to which all Indians had equal access. Moreover, although Canada contends that the First Nation was not entitled to land on Moose Deer Point, the First Nation was nevertheless given a reserve there in 1917 and has subsequently received the same benefits as other bands in Canada. Therefore, Canada submits that the First Nation's claim does not give rise to an outstanding lawful obligation.[557]

The Commission has already concluded that the 1837 council included the promise of presents, but that this treaty right was clearly and plainly extinguished by Anderson's speech of 1852. We have also found that Jarvis promised the incoming allies that they would receive land – at Manitoulin Island or in other locations that the Crown might permit, including lands already reserved for other bands, provided those bands were also prepared to consent. Coupled with these rights to presents and land were promises of equality and the right to use and occupy land for traditional purposes. We agree with the First Nation that the 1837 council included promises in respect of all these matters.

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[555] ICC Transcript, April 8, 1998, p. 110 (Gary Nelson).

[556] Written Submission on Behalf of the Government of Canada, August 7, 1997, pp. 54-55.

[557] Written Submission on Behalf of the Government of Canada, August 7, 1997, pp. 55-56.

That being said, we are concerned that the evidence tendered by the First Nation to date has not yet sufficiently established the extent of these obligations or the nature of their infringement. With respect to land, we agree with Canada that the treaty does not specify the exact location of reserve lands, when they were to be set apart, or what acreage they were to contain. However, we do not believe that these shortcomings should rest entirely at the feet of the First Nation, since it was the Crown that made the promises. Having regard for the principles of treaty interpretation, the failure to be specific should more properly be attributed to the Crown than to the Indians. We make no comment on whether the First Nation has an outstanding entitlement to treaty land on Manitoulin Island, and we are not sure that, even if such an entitlement exists, the First Nation would want land there. If such an entitlement does exist, it would presumably be open to Canada and the First Nation to negotiate other land or other forms of compensation found to be mutually satisfactory.

It is perhaps significant that, in the face of land promised at Manitoulin Island or other areas acceptable to the Crown, the First Nation's ancestors nevertheless settled at Moose Deer Point, and we raise the question of whether, in these circumstances, the First Nation should even be permitted to claim an outstanding entitlement, having settled in a location without first obtaining the Crown's approval. However, it is no less significant that, in 1917, Canada expressed a willingness to allow the First Nation to have land on Moose Deer Point. Having done so, is it now open to Canada to challenge the First Nation's right to land in that location? Given that the 1837 council gave rise to treaty rights to land, we believe that the issue of whether those rights have been fulfilled is properly the subject for negotiation.

With respect to the First Nation's equality rights and rights of use and occupation of lands for traditional purposes, we are unable to be so categorical. In our view, the First Nation has failed to tender the sort of evidence on which we can comfortably rely to define the precise extent of those rights or to be able to conclude definitively that the Crown has failed to fulfill them. Nevertheless, we are not prepared to conclude that Canada owes no outstanding lawful obligation to the First Nation. Having determined that the 1837 council was a treaty and that certain promises were made by the Crown to the assembled Indians, we believe that it is incumbent on Canada to work with Moose Deer Point to further research and negotiate the First Nation's outstanding entitlements, if any, under that treaty.

This is particularly so since the circumstances of this case give rise to the concern that the Moose Deer Point First Nation has been treated unfairly. It strikes us as unconscionable for the Crown to induce its native allies to forsake their aboriginal lands and rights in the United States to come north, and then, after taking away the presents that constituted the main inducement, to argue that those allies have no land or traditional rights worthy of forming the subject matter of a treaty. As we have already seen, although the withdrawal of presents applied to all Indians ***equally***, it did not apply ***equitably***. In this context, we recall the Commission's "supplementary mandate" to make recommendations where we conclude that the Specific Claims Policy has been implemented correctly, but the outcome is nonetheless unfair. In this case, the outcome appears to be unfair, and we are not entirely sure that the Policy has been implemented correctly in any event. We thus believe that there is an even stronger basis for invoking our supplementary mandate. Accordingly, we recommend that, provided that further research will disclose further evidence to substantiate the First Nation's treaty rights, Canada should negotiate the claim in the same spirit of conciliation contemplated by Lamer J in *Sioui*.

PART V

RECOMMENDATIONS

We have found that promises were made to the Pottawatomi ancestors of the Moose Deer Point First Nation in 1837, and that those promises amounted to a treaty. However, although the Crown has unilaterally extinguished its treaty obligation to provide presents, we have been unable to define the scope of the remaining promises of land, protection, and equality or to clearly establish whether they have been fulfilled or breached. We have therefore also been unable to determine whether the Specific Claims Policy has been implemented correctly. Nevertheless, we conclude that it was unfair for the Crown to use presents and other promises to induce the Pottawatomi and other Indian allies to give up their lands and rights in the United States, and then to withdraw the presents while at the same time contending that the allies had no rights to land or annuities.

We therefore recommend:

RECOMMENDATION 1

That Canada and the Moose Deer Point First Nation undertake research to further define Canada's obligations arising from the Crown's promises of 1837 and to verify whether those obligations have been fulfilled.

RECOMMENDATION 2

That, if Canada's obligations have not been fulfilled, the claim be accepted for negotiation under the Specific Claims Policy.

FOR THE INDIAN CLAIMS COMMISSION

Roger Augustine

Carole T. Corcoran
Commissioner

Roger J. Augustine
Commissioner

Dated this 31st day of March, 1999.

APPENDIX A

Moose Deer Point First Nation Inquiry
Pottawatomi Rights

1 **Planning conference** Ottawa, August 30, 1996

2 **Community sessions**

By agreement of counsel for the parties, community sessions were considered unnecessary for dealing with the issues before the Commission at the inquiry.

3 **Legal argument** Moose Deer Point First Nation, April 8, 1998

4 **Content of formal record**

The formal record for the Moose Deer Point First Nation Inquiry consists of the following materials:

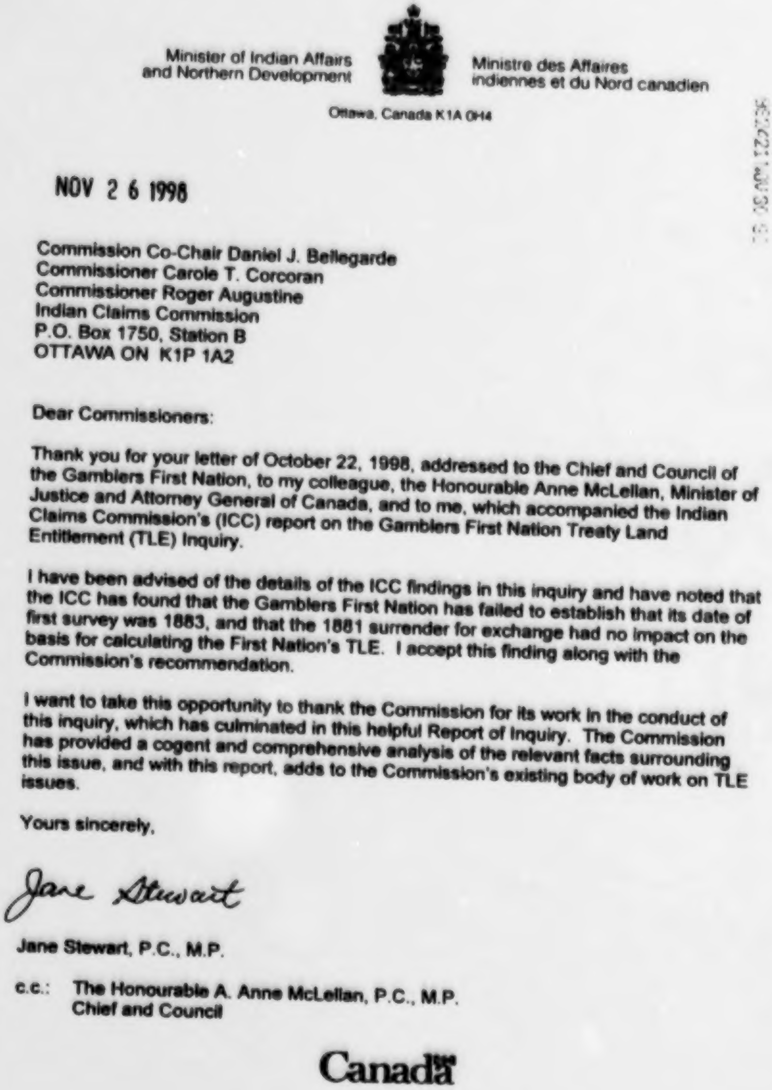
- the documentary record (2 volumes of documents, with annotated index) (Exhibit 1)
- Exhibits 2-23 tendered during the inquiry
- transcript of oral submissions (1 volume)
- written submissions and rebuttal submissions of counsel for Canada and counsel for the Moose Deer Point First Nation, including authorities submitted by counsel with their written submissions

The report of the Commission and letters of transmittal to the parties will complete the formal record of this inquiry.

RESPONSES

Re: Gamblers First Nation Treaty Land Entitlement Inquiry
Jane Stewart, Minister of Indian Affairs and Northern Development, to
Daniel J. Bellegarde, Carole T. Corcoran, Roger Augustine, Indian Claims Commission,
November 26, 1998
303

Re: Qu'Appelle Valley Indian Development Authority (QVIDA) Flooding Claim Inquiry
Jane Stewart, Minister of Indian Affairs and Northern Development, to
Chief Eugene Anaquod, Muscowpetung First Nation,
Chief Mathew Peigan, Pasqua First Nation,
Chief Melvin Isnana, Standing Buffalo First Nation,
Chief Lyle Acoose, Sakimay First Nation,
Chief Terrance Pelletier, Cowessess First Nation, and
Chief Denton George, Ochapowace First Nation,
December 3, 1998
304



Minister of Indian Affairs
and Northern Development

Ministre des Affaires
indiennes et du Nord canadien

Ottawa, Canada K1A 0H4

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Commission Co-Chair Daniel J. Bellegarde
Commissioner Carole T. Corcoran
Commissioner Roger Augustine
Indian Claims Commission
P.O. Box 1750, Station B
OTTAWA ON K1P 1A2

Dear Commissioners:

Thank you for your letter of October 22, 1998, addressed to the Chief and Council of the Gamblers First Nation, to my colleague, the Honourable Anne McLellan, Minister of Justice and Attorney General of Canada, and to me, which accompanied the Indian Claims Commission's (ICC) report on the Gamblers First Nation Treaty Land Entitlement (TLE) Inquiry.

I have been advised of the details of the ICC findings in this inquiry and have noted that the ICC has found that the Gamblers First Nation has failed to establish that its date of first survey was 1883, and that the 1881 surrender for exchange had no impact on the basis for calculating the First Nation's TLE. I accept this finding along with the Commission's recommendation.

I want to take this opportunity to thank the Commission for its work in the conduct of this inquiry, which has culminated in this helpful Report of Inquiry. The Commission has provided a cogent and comprehensive analysis of the relevant facts surrounding this issue, and with this report, adds to the Commission's existing body of work on TLE issues.

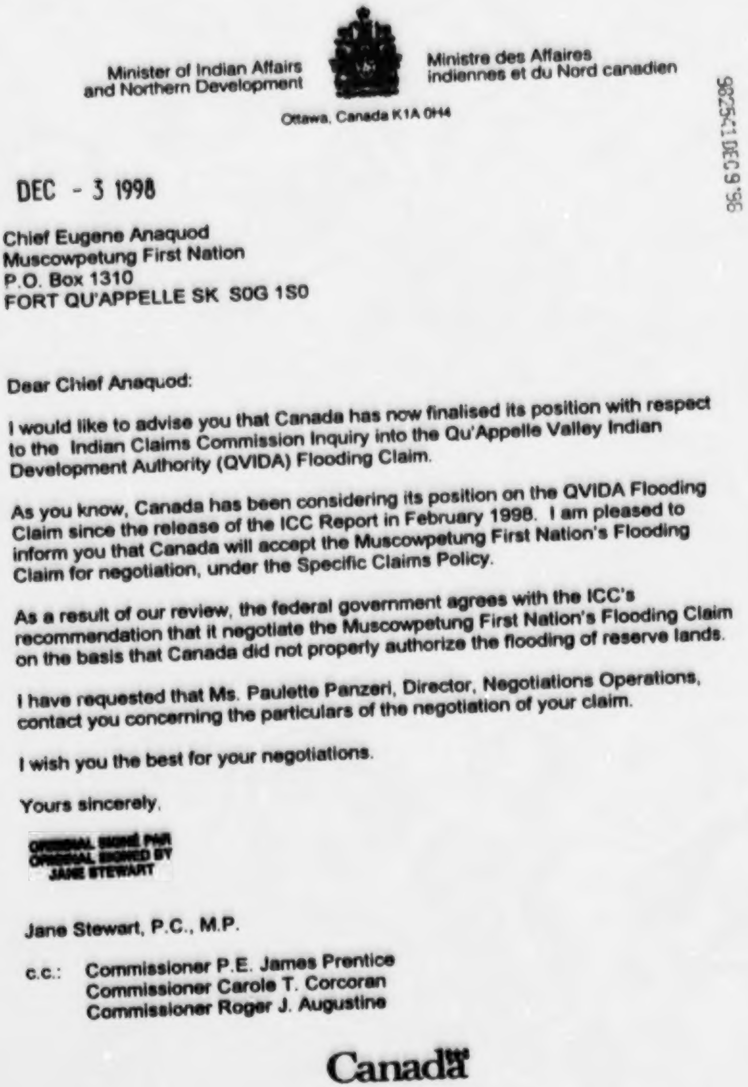
Yours sincerely,

Jane Stewart

Jane Stewart, P.C., M.P.

c.c.: The Honourable A. Anne McLellan, P.C., M.P.
Chief and Council

Canadä



Minister of Indian Affairs
and Northern Development

Ministre des Affaires
indiennes et du Nord canadien

Ottawa, Canada K1A 0H4

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DEC - 3 1998

Chief Eugene Anaquod
Muscowpetung First Nation
P.O. Box 1310
FORT QU'APPELLE SK S0G 1S0

Dear Chief Anaquod:

I would like to advise you that Canada has now finalised its position with respect to the Indian Claims Commission Inquiry into the Qu'Appelle Valley Indian Development Authority (QVIDA) Flooding Claim.

As you know, Canada has been considering its position on the QVIDA Flooding Claim since the release of the ICC Report in February 1998. I am pleased to inform you that Canada will accept the Muscowpetung First Nation's Flooding Claim for negotiation, under the Specific Claims Policy.

As a result of our review, the federal government agrees with the ICC's recommendation that it negotiate the Muscowpetung First Nation's Flooding Claim on the basis that Canada did not properly authorize the flooding of reserve lands.

I have requested that Ms. Paulette Panzeri, Director, Negotiations Operations, contact you concerning the particulars of the negotiation of your claim.

I wish you the best for your negotiations.

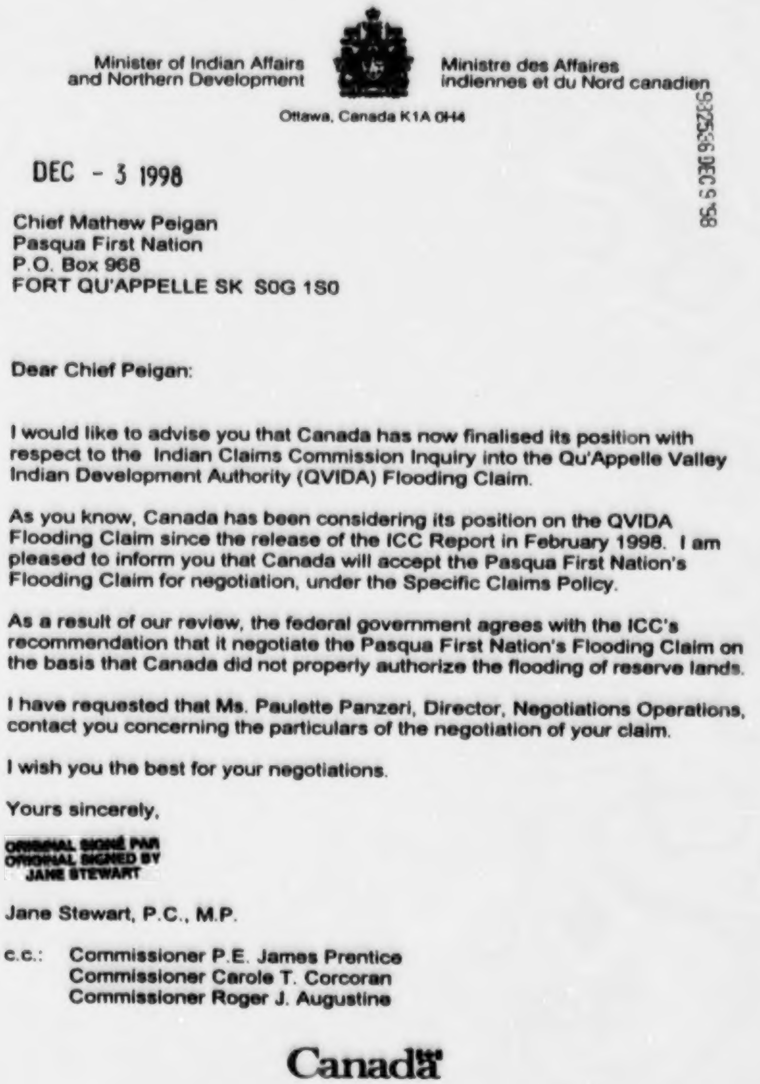
Yours sincerely,

ORIGINAL SIGNÉ PAR
ORIGINAL SIGNED BY
JANE STEWART

Jane Stewart, P.C., M.P.

c.c.: Commissioner P.E. James Prentice
Commissioner Carole T. Corcoran
Commissioner Roger J. Augustine

Canada



Minister of Indian Affairs
and Northern Development

Ministre des Affaires
indiennes et du Nord canadien

Ottawa, Canada K1A 0H4

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DEC - 3 1998

Chief Mathew Peigan
Pasqua First Nation
P.O. Box 968
FORT QU'APPELLE SK S0G 1S0

Dear Chief Peigan:

I would like to advise you that Canada has now finalised its position with respect to the Indian Claims Commission Inquiry into the Qu'Appelle Valley Indian Development Authority (QVIDA) Flooding Claim.

As you know, Canada has been considering its position on the QVIDA Flooding Claim since the release of the ICC Report in February 1998. I am pleased to inform you that Canada will accept the Pasqua First Nation's Flooding Claim for negotiation, under the Specific Claims Policy.

As a result of our review, the federal government agrees with the ICC's recommendation that it negotiate the Pasqua First Nation's Flooding Claim on the basis that Canada did not properly authorize the flooding of reserve lands.

I have requested that Ms. Paulette Panzeri, Director, Negotiations Operations, contact you concerning the particulars of the negotiation of your claim.

I wish you the best for your negotiations.

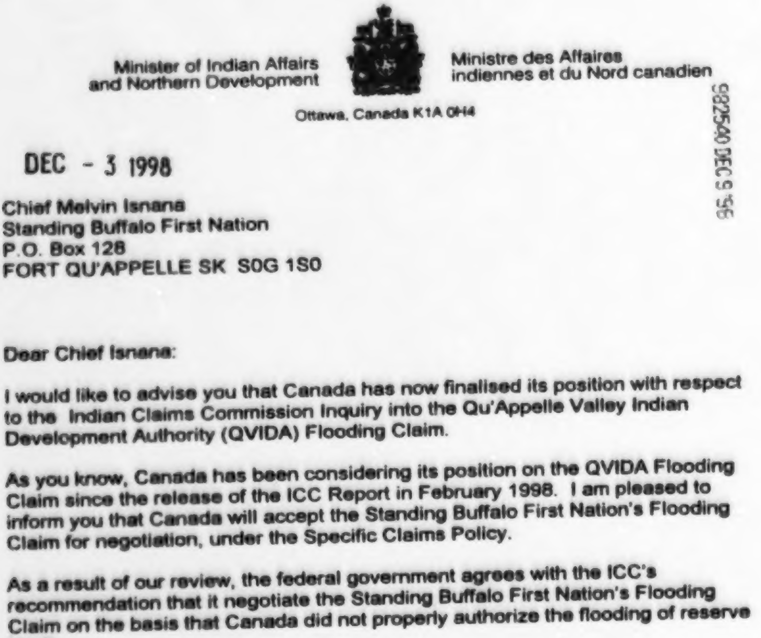
Yours sincerely,

ORIGINAL SIGNÉ PAR
ORIGINAL SIGNED BY
JANE STEWART

Jane Stewart, P.C., M.P.

c.c.: Commissioner P.E. James Prentice
Commissioner Carole T. Corcoran
Commissioner Roger J. Augustine

Canadä



Minister of Indian Affairs
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Ministre des Affaires
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Ottawa, Canada K1A 0H4

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DEC - 3 1998

Chief Melvin Isnana
Standing Buffalo First Nation
P.O. Box 128
FORT QU'APPELLE SK S0G 1S0

Dear Chief Isnana:

I would like to advise you that Canada has now finalised its position with respect to the Indian Claims Commission Inquiry into the Qu'Appelle Valley Indian Development Authority (QVIDA) Flooding Claim.

As you know, Canada has been considering its position on the QVIDA Flooding Claim since the release of the ICC Report in February 1998. I am pleased to inform you that Canada will accept the Standing Buffalo First Nation's Flooding Claim for negotiation, under the Specific Claims Policy.

As a result of our review, the federal government agrees with the ICC's recommendation that it negotiate the Standing Buffalo First Nation's Flooding Claim on the basis that Canada did not properly authorize the flooding of reserve lands.

I have requested that Ms. Paulette Panzeri, Director, Negotiations Operations, contact you concerning the particulars of the negotiation of your claim.

I wish you the best for your negotiations.

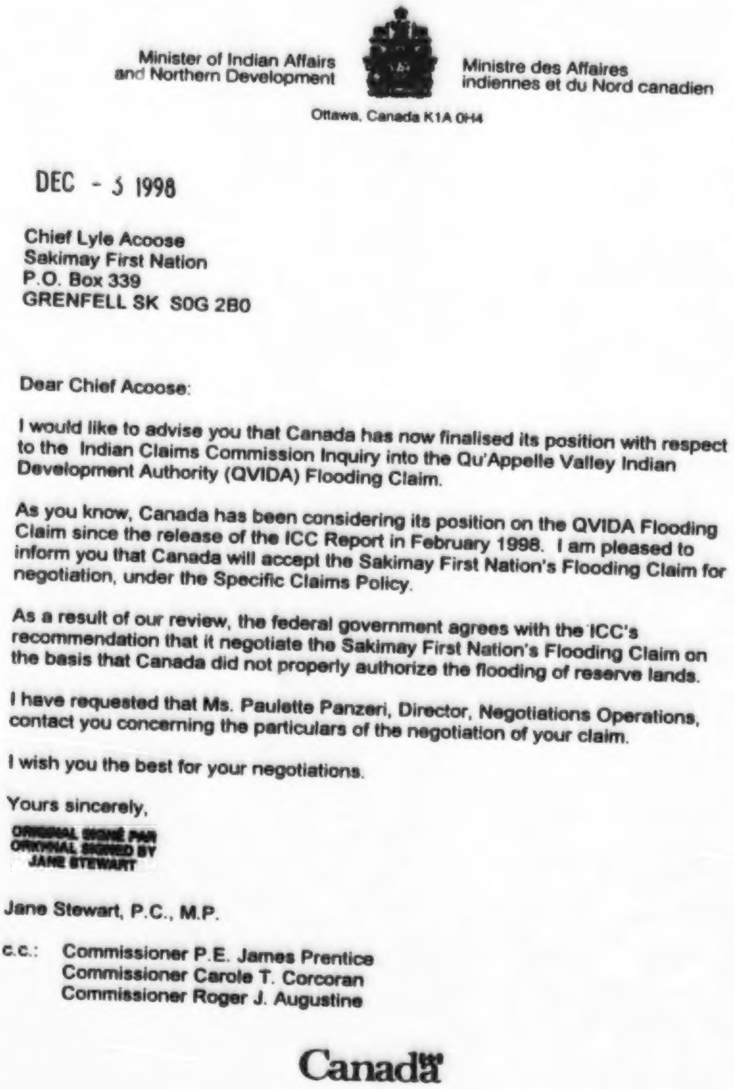
Yours sincerely,

ORIGINAL SIGNÉ PAR
ORIGINAL SIGNED BY
JANE STEWART

Jane Stewart, P.C., M.P.

c.c.: Commissioner P.E. James Prentice
Commissioner Carole T. Corcoran
Commissioner Roger J. Augustine

Canada



Minister of Indian Affairs
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indiennes et du Nord canadien

Ottawa, Canada K1A 0H4

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DEC - 5 1998

Chief Lyle Acoose
Sakimay First Nation
P.O. Box 339
GRENFELL SK S0G 2B0

Dear Chief Acoose:

I would like to advise you that Canada has now finalised its position with respect to the Indian Claims Commission Inquiry into the Qu'Appelle Valley Indian Development Authority (QVIDA) Flooding Claim.

As you know, Canada has been considering its position on the QVIDA Flooding Claim since the release of the ICC Report in February 1998. I am pleased to inform you that Canada will accept the Sakimay First Nation's Flooding Claim for negotiation, under the Specific Claims Policy.

As a result of our review, the federal government agrees with the ICC's recommendation that it negotiate the Sakimay First Nation's Flooding Claim on the basis that Canada did not properly authorize the flooding of reserve lands.

I have requested that Ms. Paulette Panzeri, Director, Negotiations Operations, contact you concerning the particulars of the negotiation of your claim.

I wish you the best for your negotiations.

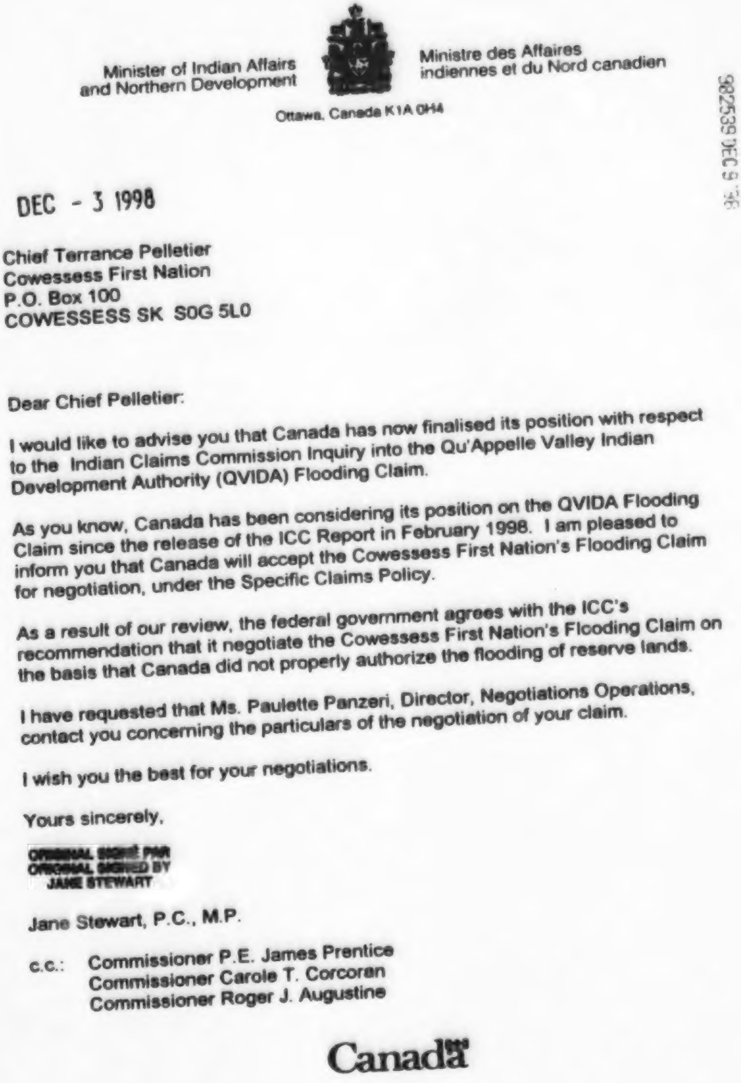
Yours sincerely,

ORIGINAL SIGNÉ PAR
ORIGINAL SIGNED BY
JANE STEWART

Jane Stewart, P.C., M.P.

c.c.: Commissioner P.E. James Prentice
Commissioner Carole T. Corcoran
Commissioner Roger J. Augustine

Canada



Minister of Indian Affairs
and Northern Development

Ministre des Affaires
indiennes et du Nord canadien

Ottawa, Canada K1A 0H4

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DEC - 3 1998

Chief Terrance Pelletier
Cowessess First Nation
P.O. Box 100
COWESSESS SK S0G 5L0

Dear Chief Pelletier:

I would like to advise you that Canada has now finalised its position with respect to the Indian Claims Commission Inquiry into the Qu'Appelle Valley Indian Development Authority (QVIDA) Flooding Claim.

As you know, Canada has been considering its position on the QVIDA Flooding Claim since the release of the ICC Report in February 1998. I am pleased to inform you that Canada will accept the Cowessess First Nation's Flooding Claim for negotiation, under the Specific Claims Policy.

As a result of our review, the federal government agrees with the ICC's recommendation that it negotiate the Cowessess First Nation's Flooding Claim on the basis that Canada did not properly authorize the flooding of reserve lands.

I have requested that Ms. Paulette Panzeri, Director, Negotiations Operations, contact you concerning the particulars of the negotiation of your claim.

I wish you the best for your negotiations.

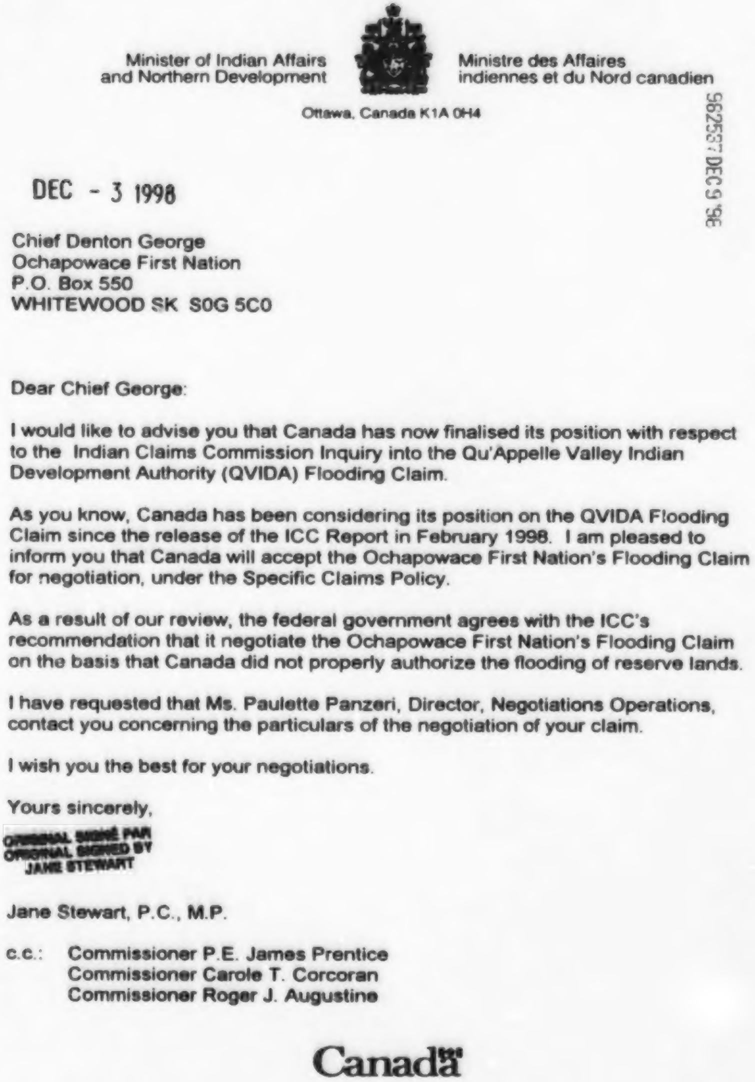
Yours sincerely,

ORIGINAL SIGNÉ PAR
ORIGINAL SIGNED BY
JANE STEWART

Jane Stewart, P.C., M.P.

c.c.: Commissioner P.E. James Prentice
Commissioner Carole T. Corcoran
Commissioner Roger J. Augustine

Canada



Minister of Indian Affairs
and Northern Development

Ministre des Affaires
indiennes et du Nord canadien

Ottawa, Canada K1A 0H4

962537 DEC 9 '98

DEC - 3 1998

Chief Denton George
Ochapowace First Nation
P.O. Box 550
WHITEWOOD SK S0G 5C0

Dear Chief George:

I would like to advise you that Canada has now finalised its position with respect to the Indian Claims Commission Inquiry into the Qu'Appelle Valley Indian Development Authority (QVIDA) Flooding Claim.

As you know, Canada has been considering its position on the QVIDA Flooding Claim since the release of the ICC Report in February 1998. I am pleased to inform you that Canada will accept the Ochapowace First Nation's Flooding Claim for negotiation, under the Specific Claims Policy.

As a result of our review, the federal government agrees with the ICC's recommendation that it negotiate the Ochapowace First Nation's Flooding Claim on the basis that Canada did not properly authorize the flooding of reserve lands.

I have requested that Ms. Paulette Panzeri, Director, Negotiations Operations, contact you concerning the particulars of the negotiation of your claim.

I wish you the best for your negotiations.

Yours sincerely,

ORIGINAL SIGNÉ PAR
ORIGINAL SIGNED BY
JANE STEWART

Jane Stewart, P.C., M.P.

c.c.: Commissioner P.E. James Prentice
Commissioner Carole T. Corcoran
Commissioner Roger J. Augustine

Canada

THE COMMISSIONERS

Co-Chair Daniel J. Bellegarde is an Assiniboine/Cree from the Little Black Bear First Nation in southern Saskatchewan. From 1981 to 1984, Mr Bellegarde worked with the Meadow Lake District Chiefs Joint Venture as a socio-economic planner. He was president of the Saskatchewan Indian Institute of Technologies from 1984 to 1987. In 1988, he was elected first vice-chief of the Federation of Saskatchewan Indian Nations, a position he held until 1997. He is currently president of Dan Bellegarde & Associates, a consulting firm specializing in strategic planning, management and leadership development, self governance, and human resource development in general. Mr Bellegarde was appointed Commissioner, then Co-Chair, of the Indian Claims Commission on July 27, 1992, and April 19, 1994, respectively.

Co-Chair P.E. James Prentice, QC, is a lawyer with the Calgary law firm of Rooney Prentice. He has an extensive background in native land claims, commencing with his work as legal counsel and negotiator for the Province of Alberta in the tripartite negotiations that brought about the Sturgeon Lake Indian Claim Settlement of 1989. Since that time, Mr Prentice has participated in the inquiry or mediation of some 70 TLE and surrender claims across Canada. Mr Prentice was appointed Queen's Counsel in 1992. He has also been the faculty leader at the Banff Centre for Management's annual program on Specific Claims since 1994. He was appointed Commissioner, then Co-Chair, of the Indian Claims Commission on July 27, 1992, and April 19, 1994, respectively.

Roger J. Augustine is a Mi'kmaq born at Eel Ground, New Brunswick, where he served as Chief from 1980 to 1996. He was elected president of the Union of NB–PEI First Nations in 1988, and completed his term in January 1994. He received the prestigious Medal of Distinction from the Canadian Centre on Substance Abuse for 1993 and 1994 in recognition of his efforts in founding and fostering both the Eel Ground Drug and Alcohol Education Centre and the Native Alcohol and Drug Abuse Rehabilitation Centre. In June 1996, he was named Miramichi Achiever of the Year by the Miramichi Regional Development Corporation. Mr Augustine was appointed a Commissioner to the Indian Claims Commission in July 1992.

Carole T. Corcoran is a Dene from the Fort Nelson Indian Band in northern British Columbia. Mrs Corcoran is a lawyer with extensive experience in aboriginal government and politics at the local, regional, and provincial levels. She served as a Commissioner on the Royal Commission on Canada's Future in 1990/91, and as a Commissioner to the British Columbia Treaty Commission from 1993 to 1995. She was appointed a Commissioner to the Indian Claims Commission in July 1992.

Elijah Harper is an Ojibwa-Cree born in Red Sucker Lake, Manitoba, where he was Chief from 1978 to 1981. Mr Harper is perhaps best known for his role in the debate surrounding the Meech Lake Accord, during which, as an opposition member for Rupertsland in the Manitoba Legislative Assembly (1981-92), he stood silently, holding a sacred eagle's feather in a symbolic stand against the Accord, citing the lack of adequate participation and recognition of aboriginal people in the constitutional amendment process. In 1986, Mr Harper was appointed Minister Without Portfolio Responsible for Native Affairs and, in 1987, he was made Minister of Northern Affairs. He was instrumental in setting up the Manitoba Aboriginal Justice Inquiry. Between 1993 and 1997, he sat as a Liberal Member of Parliament for Churchill, Manitoba. In 1995, Mr Harper launched a Sacred Assembly to promote spiritual reconciliation and healing between aboriginal and non-aboriginal Canadians which brought together people of all faiths from across Canada. In 1996, Mr Harper received a National Aboriginal Achievement Award for public service. He was appointed a Commissioner to the Indian Claims Commission in January 1999.

Sheila G. Purdy has been an advisor to the Government of the Northwest Territories on justice and other matters relating to territorial division and the creation of Nunavut. From 1993 to 1996, she was senior policy advisor to the Minister of Justice and the Attorney General of Canada on a number of justice issues, including aboriginal justice, the Canadian Human Rights Act, and violence against women. From 1991 to 1993, she was policy analyst to the National Liberal Caucus Research Bureau for the constitution, justice, aboriginal affairs, women, human rights, and the Solicitor General. In 1992/93, she was a special advisor on aboriginal affairs to the Office of the Leader of the Opposition and from 1989 to 1991, she was a legal consultant on environmental issues. She has been active in advocating against abuse of the elderly and is a co-author of *Elder Abuse: The Hidden Crime*. In 1988, she received the Award of Merit from Concerned Friends for her activities in this area. She worked as a lawyer in private practice from 1982 to 1985 after graduating with a law degree from the University of Ottawa in 1980. She was appointed a Commissioner to the Indian Claims Commission in May 1999.